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Printed in Great Britain
by
THE EASTERN PRESS LIMITED
LONDON AND READING

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THE CRIMINAL LAW REVIEW

January 1961

Programme for 1961

Criminal Law Review is now entering its eighth year, our aim as stated at its inception, is to put into the hands of all those interested in the practice and administration of the criminal law a monthly periodical which will cover every aspect of the subject in detail. We would like to draw attention to the note by Mr. Christopher Williams on the Report of " Justice " published in December. In doing so we must stress again that the views expressed in the editorial pages are those of the editors and *not* of the Editorial Board who are, of course, not responsible for the policy of this journal.

In this first issue for 1961 we are publishing an article by a special correspondent on a subject of interest to all. The article, entitled " Chemical Tests for Intoxication," is concerned with the medical effect of alcohol on the body with special reference to road safety, next month we hope to publish another article on the legal aspect of this question with particular reference to those countries in which legislation has been made on this subject.

Corporal punishment

The Advisory Council on the Treatment of Offenders confess in their Report on Corporal Punishment[1] that at the outset of their inquiry some of their number " thought that the reintroduction of judicial corporal punishment might be justified as a means of checking the growing increase in crime generally and in offences of hooliganism in particular." In the result, after weighing all the arguments, the Council were unanimously of the opinion that this step should not be taken " in respect of any categories of offences or of offenders."

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[1] Cmnd. 1213.

Among the important arguments contributing to this decision were: the lack of evidence that the prospect of a beating deters the potential offender or that its infliction renders a subsequent offence less likely; the view, supported by "considerable evidence," that those offenders who would be least harmed by corporal punishment and who might respond to it are also those who would be likely to benefit from other forms of treatment; the agreement of the majority of the witnesses "that judicial corporal punishment would militate against the success of any form of reformative treatment"; and the adverse effect of the delay that must occur between the commission of the offence and the infliction of the punishment.

The Council also advance considerations of a different type altogether—points which could not by themselves be decisive, but which add to the impressive weight of the other arguments influencing their decision. For instance, they point out that other countries are said to be severely critical of the demand here for a reintroduction of corporal punishment; and they correct a prevalent misconception by observing that to make such punishment available for a wide variety of offences (sexual offences, for example, or offences of violence) would be to return to a situation repudiated in the name of progress as long as a century ago.

The variety of opinion that apparently existed at first in the Council's own ranks was reflected in the persons whose views they obtained. Those members of the Council who have changed their opinions have, by so doing, revealed for the general public to see the potential effect of evidence, argument and mature reflection on responsible minds. The subject is one which tends to stimulate at first flush an emotional rather than an intellectual response. Now that a close examination of the problem has shown that almost all the practical arguments are against a revival of corporal punishment, the wider public debate (argued primarily on the pulse) should be stilled and the subject closed.

Preliminary investigations by police

A series of murders, violent robberies, armed hold-ups and massive mail thefts followed the publication in these pages a month ago of the report by *Justice* on Preliminary Investigations by the police. They will, no doubt, have served to put the report in perspective. Those of us who are practically responsible for the suppression of crime will have been reminded that we are not engaged in an elaborate intellectual game with gentlemanly opponents, but in a desperate fight with men who have cynically declared war on our society.

A similar conclusion will have been reached by those who read of the public debate on the report, when Lord Goddard's acid comments rather took the edge off some of the more academic criticisms of police procedure. (It is a sad reflection that the debate was given far less prominence in the more popular journals than the original criticisms; but experienced police officers are accustomed to this.) The fact remains, however, that a body of lawyers have expressed criticisms of the steps taken by the police to establish the truth of reported crimes.

How much weight ought authority to give to such expressions, and the recommendations that accompanied them? This, surely, is a matter related to the standing and reputation of the members of the committee, and of the kind of evidence they had before them. Most police officers will know little of the majority of members, beyond that they are mostly distinguished lawyers; though they may have noticed the names of one or two appended to a paper submitted to the Royal Commission on the Police, recommending, among other things, the amalgamation of police forces into eleven large units, each under a Chief Officer responsible to the Home Secretary—a form of State Police hardly conducive to the liberty of the subject. But it is the second point that will give most concern to those of us who are accustomed to proceed by the established rules of evidence, cross-examination and so on. Unfortunately, the report as published in the *Criminal Law Review* gives no indication of the witnesses consulted by the committee, nor of the evidence they gave. This, of course, presents a serious difficulty to those who must make up their minds on the value of the report as it has been presented in this journal. But it is hard to escape the feeling that much of the evidence must have come from criminals thmselves. But the committee suggests that a confession properly obtained by the police from a criminal is not to be relied upon. But would a criminal's complaint to *Justice* be any more authentic—even if cross-examination had been possible?

Most police officers from time to time hear suggestions that barristers and solicitors sometimes depart from the high standards of their profession in the conduct of cases. But few are so naïve as to accept such reports at face value. They would prefer solid evidence. One can but hope that responsible readers of the report will demand a similar standard of proof before accepting the recommendations. After all, we all had a useful lesson in such prudence read to us in the case of *R.* v. *O'Neill & Ackers* (1950) 34 Cr.App.R. 108: don't assert what you can't prove.

This is not to say, of course, that the police service need fear sound and constructive criticism. After all, the committee of

Justice was set up, eighteen months ago, in the midst of a rising storm of allegation against the police, which culminated in the Commons debate on *Garratt* v. *Eastmond*, and the setting up of the Royal Commission to find out what was wrong with the police. After a year's work, the Commission has given the preliminary answer that they are too few, and have been grossly underpaid. And the Commission has published its evidence. If the subject of this report by *Justice* can find its way to the attention of the Royal Commission, police officers can feel confident that its reaction towards criminals will be that they are too many, and are grossly overpaid. [CHRISTOPHER WILLIAMS.]

The Police

The police are to be given their much deserved and long awaited pay rise. The Government have accepted the recommendations made in the interim Report of the Royal Commission on the Police,[2] although they have not accepted the principles upon which the constables' scale should be determined and the recommendation that the situation should be reviewed at three yearly intervals. We hope that this will encourage more youngsters to join the Force.

The need for a greater number of police has recently been spotlighted in an article by Professor Radzinowicz, written as a result of research undertaken by the new Institute of Criminology at Cambridge, into the incidence of robbery in London. The chief conclusion reached in this article is that although organised gang robberies are on the increase, robberies and attacks by individuals have stopped rising since 1957. This is in a sense encouraging, however, the proportion of undetected robberies has risen very sharply in the last few years, reaching 67 per cent. in the first half of 1960. This is a very disturbing figure and means that by far the greater proportion of robberies committed in London at the moment go undetected.

Professor Radzinowicz has pointed out that the best deterrent would be to make detection as certain and speedy as possible, this can only be achieved if the Metropolitan Police and indeed the forces throughout the country are at least brought up to establishment.

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[2] Cmnd. 1222.

Chemical Tests For Intoxication – I

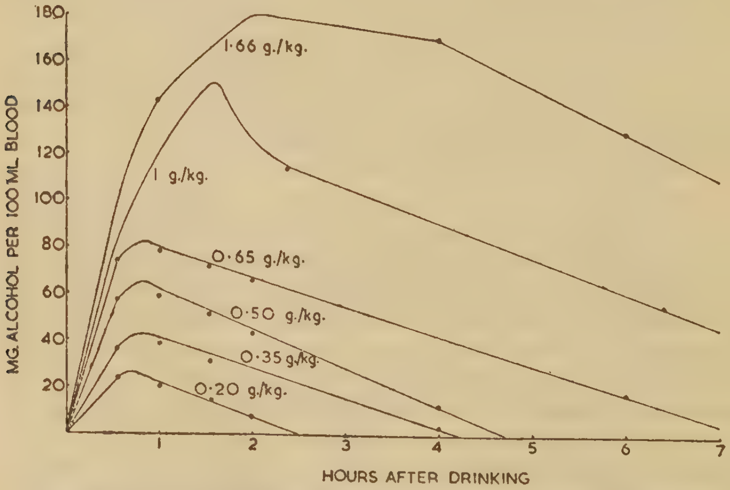
By A Special Correspondent

Introduction

This article is concerned mainly with the physiological response of the body to ethyl alcohol with special reference to road safety. Repeated heavy exposure to alcohol may, and frequently does, lead to various pathological (disease) conditions, but it is the physiological state of acute intoxication which is most frequently met with in the courts. The predominant effect of alcohol is on the central nervous system and from the scientific point of view the critical factor in assessing intoxication is the concentration of alcohol in the central nervous system tissue or the blood which supplies it. Whereas many variable factors will influence the amount of alcohol required to obtain a given concentration of alcohol in the tissues, there are very few factors which influence the response of the tissues to a given concentration of alcohol in the circulating blood. It may be said that the only factor which has any appreciable effect is the development of tolerance through repeated exposure to alcohol. In other words, whilst it would be extremely difficult to say with any certainty what will be the effect of a given amount of alcohol it can be predicted with a considerable degree of certainty what will be the effect of a given concentration of alcohol in the blood. This is the basis for acceptance by the courts in many countries of a fixed concentration of alcohol in the blood as the criterion of impairment, regardless of the individual's performance under standard clinical tests.

The variable factors which determine the concentration of alcohol in the blood have been carefully studied, and whereas the complete process of elimination of alcohol is not yet completely understood, it is now possible to present a coherent account of the existing knowledge. It must be appreciated that ethyl alcohol is an odourless and colourless liquid and the conventional forms in which alcohol are taken include many other substances, some of which may in themselves have a pharmacological effect. Hence, the bouquet of brandy is due to the ethers which it contains, while Pernod contains Thujone, a cerebral excitant, which is probably responsible for many of the undesirable effects of that drink. This need not concern us unduly as the Road Traffic Act refers to "drink or a drug" and does not specifically mention alcohol. In view of the fact that alcohol is a drug it is to be hoped that future parliamentary draftsmen will have the courage to call a spade a spade and refer to "alcohol or *other* drugs."

Ethyl alcohol has a comparatively small molecular size and is absorbed rapidly from the stomach and very rapidly indeed from the small intestine, to pass directly into the blood which conducts it to the heart and out into the general circulation. Anything which delays the emptying of the stomach or which coats the stomach lining, *e.g.*, fatty foods, will depress absorption of alcohol, and a lower concentration in the blood will result. The alcohol is distributed amongst the tissues of the body in proportion to their water content. Since the fat and the water content of the body is usually inversely proportional it follows that at any given weight a fat person will have a relatively high, and a thin person a relatively low, blood alcohol concentration following drinking the same quantity of alcohol. The optimum concentration for rapid absorption is between 10 per cent. and 30 per cent. Above 50 per cent. (100° proof) the irritant property of alcohol causes the lining of the stomach to produce excessive mucus which depresses absorption. Very small concentrations of alcohol are also relatively slowly absorbed. Distilled spirits is the most effective form in which rapid absorption of alcohol can be obtained, while alcohol in the form of beer is relatively slowly absorbed. Only about 10 per cent. of the alcohol taken into the body is excreted from



[Reproduced from "*Relation of Alcohol to Road Accidents*," being a report of a special committee of the British Medical Association, 1960.]

the body, the remainder undergoes a complicated cycle of oxidation, mainly in the liver, until it is broken down into carbon dioxide and water, which is the ultimate fate of most foodstuffs. Anything which affects the rate of oxidation will necessarily affect the rate of elimination of alcohol from the body and accordingly the blood alcohol level. Hence, the sugar known as fructose speeds up oxidation of alcohol by about a third. Habituation to brandy has also been shown to speed up the elimination of alcohol from the body by as much as 27 per cent. To save any possible confusion it must be realised that habituation to alcohol does not necessarily mean that the person is addicted to alcohol. The addict has to have alcohol and cannot do without it, whereas other persons, *e.g.*, problem drinkers, may take even more alcohol than an addict, but can always stop drinking without the development of serious symptoms.

Ignoring these variable factors it is found, under standard conditions, that the concentration of alcohol in the blood after taking a drink, rises sharply to a peak about one-half to one hour after drinking and then falls off gradually. With increasing amounts of alcohol the peak is reached slightly later, and with distilled spirits in high concentrations an " overshoot " peak may occur. Light wines (approximately 12 per cent. alcohol by volume) give a lower peak owing to their slower absorption, and ordinary beer (about 3 per cent. or 4 per cent. alcohol by weight) gives a still lower peak and the alcohol is found to have left the blood very much quicker than would have been the case if the same amount of alcohol had been taken as distilled spirits.

Inevitably some delay occurs before the concentration builds up in the urine contained in the bladder as the alcohol has to be extracted from the blood by the kidneys and excreted into the bladder. Accordingly, the concentration of alcohol in the urine builds up rather more slowly, reaching a peak of concentration some 20 or 25 minutes later than in blood, and then falls off proportionately to that in blood. It is possible to calculate with considerable accuracy the concentration of alcohol in the blood from a knowledge of the concentration of alcohol in the urine. Although it would appear that the urine analysis would be unreliable unless the bladder was first of all emptied before a sample was taken, this is not found to be the case in practice, as it makes little difference to the result whether or not the bladder is emptied prior to taking a specimen.[1]

It is clear from consideration of the various factors which influence the absorption and elimination of alcohol by the body that it is extremely difficult to prophesy the concentration of alcohol in the blood following the taking of a given quantity of alcohol. Some conversion tables are given below but it must be clearly understood that they enable one to estimate only the minimum amount of alcohol which must have been taken from a knowledge of the blood alcohol concentration. At least 66 per cent. of the cases would, in practice, require at least half as much alcohol again to reach the stated concentration, and many persons would require at least twice as much. Accordingly, it is impossible to read the tables conversely except in so far as giving a general guide as to the maximum amount of alcohol it is safe to take before reaching the stated level.

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[1] Drew, G. C., *et al.* (1958) *Brit.Med.J.* **2**, 993.

The concentration of alcohol in the blood may be expressed either as weight of alcohol in proportion to volume of blood, or as weight of alcohol in proportion to weight of blood. Although the difference is small it is significant in that legislation in some countries (*e.g.*, United States) refers to weight/weight ratio whereas it is the almost invariable analytical practice to carry out volumetric

TABLE I

Minimum Intake of Ordinary Beer or Stout as Calculated from the Alcohol Found in the Blood or Urine

(For a male of body weight of 11 stone and assuming average alcohol content.)

Blood Result in mg./100 ml.	Urine Result in mg./100 ml.	Intake in Pints
18	24	½
37	49	1
55	73	1½
73	97	2
92	123	2½
110	147	3
128	171	3½
147	196	4
165	220	4½
183	244	5
201	268	5½
220	293	6
238	317	6½
257	343	7
293	391	8
329	439	9
366	488	10
440	587	12
513	684	14

TABLE II

Minimum Whisky or Gin Intake as Calculated from the Alcohol Found in the Blood or Urine

(For a male of body weight of 11 stone and assuming average alcohol content.)

Blood Result in mg./100 ml.	Urine Result in mg./100 ml.	Whisky * in fl. oz.
22	30	1
45	60	2
67	90	3
90	120	4
112	150	5
135	180	6
157	210	7
180	240	8
202	270	9
225	300	10
247	330	11
270	360	12
300	400	$13\frac{1}{3}$ (= $\frac{1}{2}$ bottle)
360	480	16
427	570	19
495	660	22
562	750	25
600	800	$26\frac{2}{3}$ (= 1 bottle)

* 1 whisky = $^5/_6$ fl. oz. approx. 1 double whisky = $1^2/_3$ fl. oz. approx.

[Tables reproduced from "*Relation of Alcohol to Road Accidents*." British Medical Association, 1960.]

estimations, *i.e.*, weight of alcohol/volume of blood. Confusion may, therefore, occur where concentrations are expressed as percentages. Nor is there any universal standard practice in the method of expressing concentration in terms of measures and it is found that percentages, parts per thousand and other ratios are freely used. It is the practice in this country to refer to concentrations of alcohol in terms of mg. alcohol per 100 ml. blood. This prevents any possible confusion and also avoids the use of that shifty character the decimal point which is inevitable where concentrations of alcohol are expressed as percentages. It is sincerely to be hoped that when the time comes parliamentary draftsmen will adopt this method of expressing concentrations of alcohol and not rely on dubious percentages, as, for example, was done in a recent private member's Bill.

General effects of alcohol at various concentrations in the blood

Alcohol is a depressant of the central nervous system. The apparent stimulant effect of alcohol is the result of its depression of the higher centres of the brain thereby releasing the lower centres from control of the higher centres, *i.e.*, the release of inhibitions. The immediate result is a feeling of well-being during which the individual overestimates his capacity to carry out physical and mental work, and underestimates any mistakes made in the performance of such work. This is particularly noticeable in tests of skills resembling driving or of actual driving performance where it is found that drivers, after having taken alcohol, believe that they have driven exceptionally well whereas trained observers have detected a marked deterioration in their performance as compared with that before they took alcohol. There is a decrease in awareness and reaction to sensory stimuli, *e.g.*, the threshold of pain is raised, a property of alcohol which was made use of in the days before general anaesthetics. Differences in the intensity of various stimuli are less easily distinguished, especially in the case of light or touch. The ability to distinguish differences in colour is affected even at very low concentrations of alcohol. The ability to register letters or words shown for only a short period is reduced and this is noticeable even within 10 minutes of taking alcohol. Vision is affected at concentrations as low as 10 mg./100 ml. Stronger illumination is needed for distinguishing objects and dimly lit objects will not be distinguished at all. Finally, a person will take longer to see clearly again after being dazzled by a strong light, a factor of some significance in night driving. The most commonly recognised symptom of alcoholic intoxication, muscular inco-ordination, does not usually become apparent until a concentration in the region of 150 mg./100 ml. has been reached, by which time there has already been considerable deterioration in driving performance. Reaction time to noises and lights is made slower by 10 per cent. at 80 mg./100 ml. and by 26 per cent. at 140 mg./100 ml., yet conviction under our existing law is unlikely even at the higher of these two concentrations as gross muscular inco-ordination may not be present until still higher concentrations are reached.

Effect on skills resembling driving and actual driving performance

The evidence is reviewed in the recent B.M.A. Report (" *Relation of Alcohol to Road Accidents* ") and the results of a large number of carefully controlled experiments are now available to show beyond doubt that even at low concentrations of alcohol in the blood deterioriation in driving performance can be shown. Decreased accuracy of steering, steering "wobble," tendency to deviate over to the crown of the road, increase in steering-wheel movement, tracking errors, all were found by Professor Drew to be present and increasingly marked at levels between 10 mg. and 80 mg./100 ml.[2] Loomis and West[3] in Washington found deterioration at concentrations as low as 30 mg./100 ml. and that at 100 mg./100 ml. performance had decreased by 15 per cent., and at 150 mg./100 ml. by some 30 per cent. In passing, it is interesting to note that none of their subjects showed any deterioration in the standard clinical tests for intoxication between 30 and 90 mg./100 ml. and that only two showed even slight impairment of co-ordination between 100 and 170 mg./100 ml. It was noticed that with increasing concentrations of alcohol the subjects become progressively less able to divide their attention between the road and traffic lights, *i.e.*, the one would be sacrificed for the other. Bjerver and Goldberg[4] in Sweden noticed impairment in capacity to drive a car by between 25 per cent. and 30 per cent. at concentrations as low as 40 and 50 mg./100 ml.

In the recent experiments conducted in the Crime Detection Laboratories of the Royal Canadian Mounted Police[5] particular attention was paid to differences between light, moderate and heavy drinkers. The majority of drinkers showed marked impairment at 120 mg./100 ml. and the few who did not were all heavy drinkers, and even these showed marked impairment at 150 mg./100 ml. Whereas persons who were both experienced drivers and heavy drinkers could compensate to some degree for the effect of alcohol, the ability to do so fell off very rapidly at about 100 mg./100 ml. At 79 mg./100 ml. the impairment in the various groups was as follows: light drinkers, 68 per cent.; intermediate drinkers, 47 per cent.; and heavy drinkers, 40 per cent. Abele in Germany[6] using professional car drivers found a 24 per cent. increase in changes of position of the steering wheel at 100 mg./100 ml. and increase in steering-wheel movement by as much as 35 per cent. at this concentration. These changes were particularly noticeable on long, straight stretches of the course.

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[2] Drew, G. C., *et al.* (1958), see n. 1.

[3] Loomis, T. A., *et al.* (1958) Quart.J.Stud. Alcohol **19,** 30.

[4] Bjerver, K., *et al.*, *Proceedings of the First International Conference on Alcohol and Traffic*, Stockholm, 1951, p. 132.

[5] Goldwell, B. B., *et al.* (1958) Quart.J.Stud. Alcohol **19,** 590.

[6] Abele, G. (1958) *Dtsch.Z. Ges gerichtl. Med.* **47,** 447, 462; **48,** 58.

Statistical evidence of relation of concentration to accidents

In the two adequately controlled statistical series [7, 8] the accident hazard was found to be approximately ten times greater at concentrations above 150 mg./100 ml. than below 50 mg./100 ml. Uncontrolled series from a large number of countries show a remarkable degree of agreement in the concentrations of alcohol at which accidents are prone to occur. One of the most interesting series concerned approximately 2,000 accidents which occurred in Stuttgart between 1953 and 1956.[9] This showed the predominant effect of alcohol in accidents causing serious personal injury or fatality. Whereas 4·4 per cent. of accidents resulting in death were caused by alcohol, only 1·1 per cent. of accidents from other causes resulted in death. Of the fatal accidents in Stuttgart during this period 18·7 per cent. were caused by alcohol, as compared with 10·4 per cent. of those involving serious injuries and only 6 per cent. of those involving light injuries. In other words, where alcohol is a factor in an accident it is far more likely to be a serious accident. Furthermore, the proportion of fatalities and serious injuries is very much higher at relatively low concentrations of alcohol, *i.e.*, below 100 mg./100 ml. This lends support to the suggestion, which now commands considerable support, that it is the driver who has had only a few drinks who is most likely to cause serious accidents. Unfortunately, while most people honestly believe they drive better after having had a few drinks they do in fact drive very much worse. This is particularly true where some unexpected crisis occurs on the road requiring an instant decision.

The basis of chemical tests for intoxication

There are more than 200 analytical methods for ethyl alcohol but they fall generally into one of two classes. First, laboratory tests, which are applied chiefly to blood, urine and saliva; and secondly, methods of analysing exhaled breath. The main steps in analysis are (1) sampling, *i.e.*, collection of the breath or body fluid to be analysed; (2) separation of ethyl alcohol from the sample; and (3) estimation of the amount of alcohol which has been separated.

Laboratory tests

In this country the forensic science laboratories invariably use one of two methods advocated by a panel of the Royal Institute

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[7] Holcomb, R. L. (1938) J.Amer.med.Assn. **III,** 1076.

[8] Lucas, G. H. W., *et al.*, *Proceedings of the Second International Conference on Alcohol and Traffic*, Toronto, 1955, p. 139.

[9] Mach, N., *Jahrbücher für Statistik und Landeskunde von Baden-Württemberg*, Stuttgart, 1957.

of Chemistry for purposes of court work.[10] The main reason is not so much that these methods are intrinsically superior to others, but so as to obtain some measure of standardisation. These methods are an adaptation of the Cavett (micro) method, and the Kozelka and Hine modified method. The Cavett method uses only 0·1 ml. of blood and gives excellent results in the hands of trained technicians. It is affected, however, by the presence of ketone bodies, and if these are present they must be removed before the test is carried out. The Kozelka and Hine method is not affected by ketones but has the disadvantage that the constant attention of the operator is required, and the apparatus is awkward both to use and to clean. The Kozelka and Hine method has been found to be the more *precise* method, the fiducial limits being closer together. The Cavett method is the more *accurate* since the fiducial limits "bracket" the correct answer, whereas the Kozelka and Hine limits for urine can only at the best just include the correct answer and for blood certainly do not do so. Independent analyses show, on a distribution of mean results, that the Cavett method has a standard error of 14 mg./100 ml. and the Kozelka and Hine method a standard error of 8 mg./100 ml. When four analyses are made the standard error is reduced to 0·707 of its previous value. The same range of error occurs whether urine or blood is used.

Blood samples are rarely taken for analysis in this country. The procedure with urine, as recommended by the British Medical Association,[11] is that the suspect passes a sample of urine, in the presence of a witness, into a single bottle supplied to the police by a forensic laboratory. The specimen is then divided into three parts by pouring it into three smaller bottles (also supplied by the laboratory) and sealed in the presence of the suspect. One of the smaller bottles is then given to him and the other two are sent by the police to an approved laboratory, where one will be used for the estimation of its alcohol content and the other retained for the use of the court in any subsequent proceedings. In view of long experience of chemical testing in the Scandinavian countries it is interesting to note the procedure followed in Sweden.[12] Six samples of blood solvents are taken in small glass capsules and are sent to the State Medico-legal Laboratory. A urine sample is also sent. Three of the capsules are analysed by one method, and two by a completely different method. The analyses are conducted by five different analysts and the standard deviation is calculated. Three times the standard deviation is subtracted from the actual figure in order to give the accused the benefit of any doubt and the resulting figure is given to the court.

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[10] Kent Jones, D. W., *et al.* (1954) *The Analyst* **79**, 121.

[11] *Recognition of Intoxication* (revised edition, 1958), p. 24.

[12] Goldberg, L., *Proceedings of the Symposium on Alcohol and Traffic*, Dept. of Police Administration, Indiana University, Bloomington, 1959, p. 120.

Breath analysis

Obvious disadvantages are presented by the collection of samples of blood and urine. Not only are the procedures cumbersome but there is generally a delay of about 24 hours before the result can be obtained from the laboratory. Breath analysis presents obvious advantages in that the sample is obtained with the minimum of inconvenience or delay and the result is immediately obtainable. For this reason, the development and adoption for legal purposes of the results of breath analysis has been extremely rapid in some countries, notably the United States, Canada, Sweden and Switzerland. The underlying principle of breath analysis is that 1 ml. of blood contains as much alcohol as does 2,100 ml. of alveolar air, and the existing machines either measure the alcohol in the expired air directly, or measure the ratio of carbon dioxide to alcohol in the expired air. (2,100 ml. of alveolar air contains about 190 mg. carbon dioxide.) The instrument which has attracted the most attention in this country is the " Breathalyser," an extremely stable and accurate instrument, which directly measures the amount of alcohol in the expired air. 52·5 ml. of alveolar air are collected and the weight of alcohol in this volume is determined. The result, multiplied by forty, gives the amount present in 2,100 ml. alveolar air, which is equivalent to 1 ml. blood. In the machine the breath is passed through a yellow solution of potassium dichromate in sulphuric acid, which is gradually oxidised by the alcohol causing a colour change in the solution according to the concentration of alcohol present. The colour change is photo-electrically determined on and registered on a scale. The machine is extremely stable and rarely gives rise to trouble. The most likely error is that the subject does not blow adequately into the tube, but this leads only to a lower reading than the true value.

Condensed theory of the Breathalyser

The method consists of three principal phases:

1. Collecting the sample.
2. Passing the sample through a dichromate-sulphuric solution.
3. Measuring the amount of dichromate required to oxidise the alcohol.

The first phase involves having the subject blow with force into a heated plastic tube. The breath raises a piston in a metal tube. When the piston reaches the top of its stroke it is held in this position by a small magnet aligned with two fixed pole pieces. Two holes just below the piston permit the breath to escape so that, when blowing is stopped, the cylinder is full of the last breath. When blowing stops, the piston drops from its supporting iron plate sufficiently to seal the holes, so that the breath cannot be sucked out.

A special valve is incorporated in the top of the sample chamber. It is designed to make leaks virtually impossible. The valve and magnet operate on the same shaft, rotated by the Control Knob on the panel. When the valve is in the TAKE position, the breath passes from the retractable sample tube to the sample chamber. The magnet is aligned with the fixed pole pieces and the piston is supported. When the valve is turned to ANALYSE, the magnet is disaligned with the fixed pole pieces and the piston, by its own weight forces the measured amount of air through 3 ml. of 0·025 per cent. potassium dichromate in 50 per cent. by volume sulphuric acid solution.

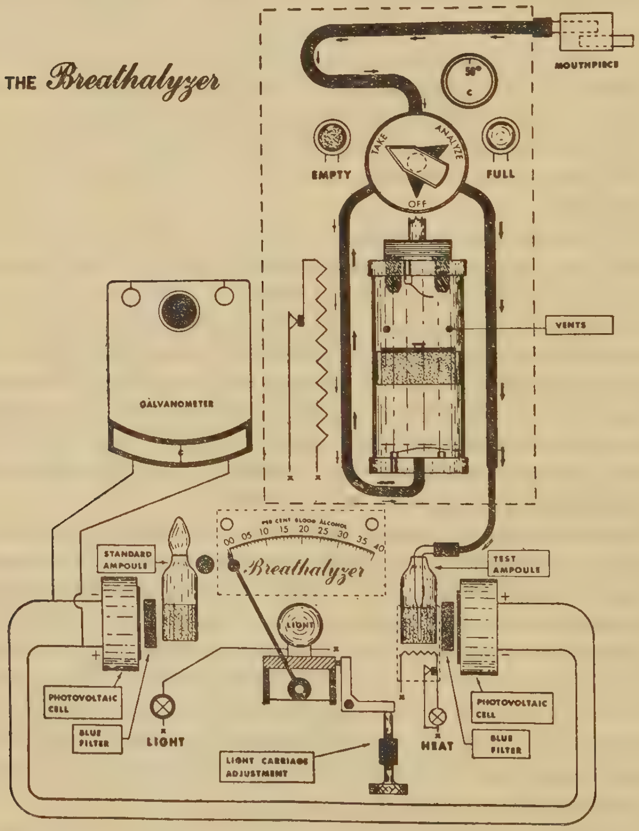
The sample chamber delivers 5·25 ml. of alveolar air to the solution, but the chamber actually contains 57 m.l. This is necessary because the breath is raised from mouth temperature (31–34°C) to 45–50°C rise in temperature. The 52·5 ml. of breath will occupy a larger volume at this higher temperature. Also, the delivery tube from the sample chamber to the test solution is full of room air before the test, and full of breath after the test. This volume added to the cylinder volume, adds up to 57 ml. The breath bubbles through the test solution in about 30 seconds. One and a half minutes later, the reaction is complete.

Before the test is started, the "Test" ampoule of solution is balanced photometrically against another ampoule. The reading light is moved back and forth between the two ampoules until the galvanometer reads on centre. This indicates that each of the two photocells is receiving the same amount of light. The position of the light is noted by setting the Blood Alcohol Pointer to the base-line of the scale. After the analysis, the reading light is again turned on. If part of the dichromate has been consumed by alcohol, more light will reach the right band-cell and the "null" galvanometer will no longer be centred.

The light is moved until the balance is again established as indicated by the centring of the galvanometer. The distance the light is moved is directly proportional to the amount of dichromate used, and this is directly related to the amount of alcohol in the breath. The scale is calibrated in percentage of blood alcohol.

Since 52·5 ml. is $^1/_{40}$ of 2,100 ml. (the amount of alveolar breath equal to 1 ml. of blood), the alcohol figure must be multiplied by forty for the answer in mg. of alcohol per cc. of blood. This figure must be divided by ten to convert it to percentage of blood alcohol, and these are the figures on the scale.

With this arrangement, line voltage affects each ampoule and photocell the same, so changes in this voltage make no difference. For the same reason, changes in intensity of the reading light make no difference. The actual output of the photocells makes no


THE Breathalyzer
MOUTHPIECE
50° C
TAKE
ANALYZE
OFF
EMPTY
FULL
VENTS
GALVANOMETER
PER CENT BLOOD ALCOHOL
00 05 10 15 20 25 30 35 40
Breathalyzer
STANDARD AMPOULE
TEST AMPOULE
+
-
PHOTOVOLTAIC CELL
BLUE FILTER
LIGHT
LIGHT
LIGHT CARRIAGE ADJUSTMENT
HEAT
PHOTOVOLTAIC CELL
BLUE FILTER

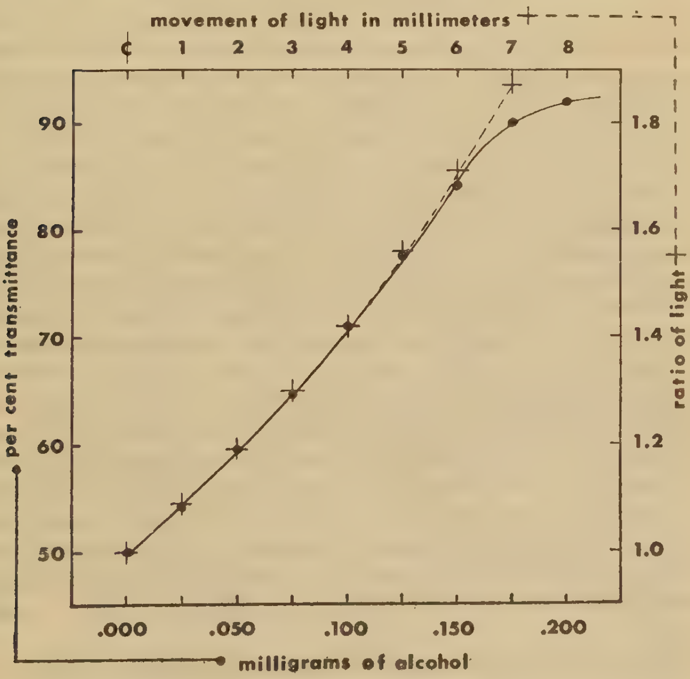
[13] The diagram of the "Breathalyser" and the computation chart are reproduced by kind permission of Prof. R. F. Borkenstein of the Department of Police Administration, Indiana University, Bloomington, Ind.

difference since they are balanced before each test. The strength of the test solution is unimportant since only the dichromate used in the test is measured. Thus, the instrument is not dependent on constant conditions. The only factor that must be maintained is the accurate volume of the test solution. A special guage is provided to check this volume in each ampoule.

Chemical Reaction in the Breathalyser

Potassium Dichromate	Chromium Sulphate
Sulphuric Acid	Potassium Sulphate
	Acetic Acid
Alcohol	Water
Yellow	Green

$$2K_2Cr_2O_7+8H_2SO_4+3C_2H_5OH = 2Cr_2(SO_4)_3+2K_2SO_4 \pm 3CH_3COOH+11H_2O$$



This chart shows the entire Breathalyser computation. The solid curve is the change in blue light transmittance of the solution caused by addition of known amounts of alcohol, shown on the abscissa. These figures will be $^1/_{40}$ of the blood alcohol figure since the Breathalyser analyses 52·5 ml. of breath, or $^1/_{40}$ of 2,100, the amount of breath equal to 1 ml. of blood. The dotted curve shows the change in the ratio of light falling on the two ampoules and the changes in this ratio caused by movement of the light. The two curves are congruent well above the 0·100 mg. point, which represents full-scale on the Breathalyser. Thus when the photocells are receiving the same amount of light, the position of the light between the ampoules will be a measurement of the transmittance of the test solution.

The " Breathalyser " has been in practical use in certain centres for some years and sufficient experience has been obtained as to its accuracy and reliability. In Toronto the first " Breathalyser " obtained by the police is still in excellent working order after more than 5,000 analyses, 1,500 of which were used as evidence in court.[14] Most of the criticism of the accuracy of the machine is based on comparison of the readings with those obtained simultaneously on venous blood. This, of course, assumes that the analytical result from venous blood is correct, whereas in fact it is subject to some error, as has already been seen. Using the methods of analysis recommended by the Royal Institute of Chemistry for use in court cases in Great Britain, the standard error is found to be in the region of 14 mg./100 ml. when different analysts are used, or 6 mg./100 ml. if only one analyst is used. Professor Drew,[15] using a " Breathalyser " in experiments conducted in this country, found it had a standard error of 12 mg./100 ml. which, therefore, compares favourably with blood analysis. Experiments carried out in Basle and Geneva where the " Breathalyser " is used extensively show that it is in fact more accurate than the standard forms of analysis for blood alcohol used in those cities.[16] Finally, it should be appreciated that the critical concentration is that in the blood actually perfusing the central nervous system tissue and it may well be that for physiological reasons breath analysis gives a more accurate result than analysis of venous blood. The concentration in capillary blood (which will approximate more closely than venous blood to that perfusing the central nervous tissue) is found to be between 15 per cent. and 22 per cent. higher than in venous blood during the first 70 minutes after drinking alcohol in many cases.[17]

Breath analysis now provides a practical alternative to analysis of urine or blood from the scientific point of view. From the legal point of view certain difficulties remain to be overcome. In particular the instrument is not completely "foolproof." The careless operator who does not adjust the pointer properly will get a misleading result. This is not, of course, a relevant consideration where the analysis is conducted by trained technicians, but it is an important factor if the instrument is used by police officers as is the practice in the United States. An essential pre-requisite to introduction of a breath testing programme would be adequate arrangements for servicing and checking the instrument, and its operation by properly trained personnel.

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[14] Ward Smith, G. H. L., *et al.* (1958) Crim. Law Quart. **1,** 25.

[15] Drew G. C., *et al.* (1958), see note 1.

[16] Monnier, Par D., *et al.*, *Etude Critique du " Breathalyser " appareil de Dosage de L'Alcohol dans L'Haleine*, 1960.

[17] Harger, R. N., *et al.* (1956) Quart.J.Stud. Alcohol **17,** 1.

The Prevention of Crime Act, 1953

By IAN BROWNLIE, M.A.,

Lecturer in Law in the University of Nottingham

The Act[1] received the Royal Assent on May 6, 1953, and has already had an extremely useful life. Up to December 31, 1955, 244 persons were prosecuted in the Metropolitan Police District for offences under it, of whom 203 were summarily convicted.[2] It applies in Scotland but not in Northern Ireland. The statute has been in operation for a period of time sufficient for difficulties of interpretation to emerge and the object of the present article is to examine the problems of interpretation and the relation of the Act to other parts of the criminal law.

The whole substance of the Act is in section 1:

> "Prohibition of the carrying of offensive weapons without lawful authority or reasonably excuse.—(1) Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence, and shall be liable—
>
> (*a*) on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding fifty pounds, or both;
>
> (*b*) on conviction or indictment, to imprisonment for a term not exceeding two years or a fine not exceeding one hundred pounds, or both.
>
> (2) Where any person is convicted of an offence under

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[1] 1 & 2 Eliz. 2, c. 14.

[2] H.C. Debates, Vol. 555, col. *66*, June 28, 1956.

> subsection (1) of this section the court may make an order for the forfeiture or disposal of any weapon in respect of which the offence was committed;
>
> (3) A constable may arrest without warrant any person whom he had reasonable cause to believe to be committing an offence under subsection (1) of this section, if the constable is not satisfied as to that person's identity or place of residence, or has reasonable cause to believe that it is necessary to arrest him in order to prevent the commission by him of any other offence in the course of committing which an offensive weapon might be used."

Subsection (4) contains some definitions to be considered subsequently.

The Act provides a particularly interesting example of preventive justice. In the first place it discourages the carrying of weapons which would be dangerous if used when those carrying them engage, as a result of temperament, drink, or need for diversions, in fighting among themselves or assaults on policemen or other citizens. Secondly, it tends to protect those who are wont to carry " flick " knives or razors as a badge of manhood, one equivalent of a sword for our latter-day young bloods, from the consequences of their own folly by making less likely the facile stab with a sharp weapon which can result in a charge of homicide.

It is worth noticing that some cases of possession of offensive weapons are covered by the law beyond the preview of the Act of 1953. The Statute of Northampton, 1328, provides[3] that everyone is guilty of a misdemeanour who comes before the Sovereign's justices or other of her ministers executing their office with force and arms, or brings force " in affray of the peace," or goes armed by night or day in any fair, market, or in the presence of the Sovereign's justices or other ministers, or elsewhere, in such a manner as to terrify the Sovereign's subjects. The punishment is forfeiture of the arms carried and imprisonment at the Sovereign's pleasure.[4] The offence is triable at quarter sessions or assizes. In *R.* v. *Meade*[5] in 1903 the prisoner was convicted at Caernarvon Assizes on a count laid under one Statute of 1328. He had been seen in the public street with a revolver which he subsequently fired in the direction of the bedroom of his brother's house. The offence of going armed to terrify the Queen's subjects is also a common law misdemeanour.[6] In *Meade* Mr. Justice Wills was referring to this offence when he reminded the jury that not only was the offence charged under the Statute but "also under the common law, by which he was liable to punishment for making himself a public nuisance by firing a revolver in a public place, with the result that the public were frightened or terrorized." There is no good reason for believing that "going armed" connotes only the carrying of firearms.[7] Moreover, there is some authority for the view that there is an affray if persons arm themselves with dangerous and unusual weapons in such a manner as will necessarily cause terror to the people.[8] The carrying of weapons may cause a gathering of persons to become an unlawful assembly.[9]

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[3] 2 Edw. 3, c.3.

[4] See Halsbury, 3rd ed., Vol. 10, para. 1083; *Russell on Crime*, 11th ed., I, pp. 294–5; 1 Hawk., c. 28, p. 488. *Cf.* the Criminal Code of Queensland as amended to June 30, 1950, s. 69. Punishment today will be at the discretion of the court (Russell, *op. cit.*, p. 296).

[5] 19 T.L.R. 540. See also *R.* v. *Smith* (1914) 2 I.R. 190.

Some more particular prohibitions exist. The Firearms Act, 1937,[10] s. 23 (2), provides a penalty for possessing any firearm or imitation firearm at the time of committing, or at the time of apprehension for any offence specified in the Third Schedule to the Act. The Public Order Act, 1936,[11] provides as follows in section 4:

> (1) Any person who, while present at any public meeting or on the occasion of any public procession, has with him any offensive weapon, otherwise than in pursuance of lawful authority, shall be guilty of an offence.
>
> (2) For the purposes of this section, a person shall not be deemed to be acting in pursuance of lawful authority unless he is acting in his capacity as a servant of the Crown or of either House of Parliament or of any local authority or as a constable or as a member of a recognised corps or as a member of a fire brigade.

The Customs and Excise Act, 1952[12] provides in section 73:

> Any person concerned in the movement, carriage or concealment of goods contrary to . . . any prohibition or restriction . . . who, while so concerned, is armed with any offensive weapon or disguised in any way, and any person so armed or

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[6] *R.* v. *Dewhurst* (1820) 1 St.Tr.(N.S.) 529, 601–602.

[7] The arms carried in *Dewhurst*, above, included pistols and pikeheads.

[8] 1 Hawk., c. 28, p. 488; Russell, *op. cit*,. p. 294. There is an obvious connection with the common law misdemeanour of going armed: *cf.* the treatment in *Hawkins, loc. cit.*

[9] Russell, p. 284. See *R.* v. *Vincent* [1839] 9 C. & P. 91 (the carrying of sticks).

[10] 1 Edw. 8 & 1 Geo. 6, c. 12.

[11] 1 Edw. 8 & 1 Geo. 6, c. 6.

[12] 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44.

> disguised found in the United Kingdom in possession of any goods liable to forfeiture under one customs Act, shall be liable on conviction or indictment to imprisonment for a term not exceeding three years and may be detained.

Lastly, the Night Poaching Act, 1828,[13] provided in section 9:

> If any persons, to the number of three or more togehter, shall by night unlawfully enter or be in any land . . . for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, firearms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanour . . .

As a further preliminary some inquiry must be made as to the probability of the courts giving the Prevention of Crime Act an extensive rather than a narrow interpretation. Halsbury states what may be termed the orthodox rule that where a penal Act is capable of two constructions the more lenient construction should be adopted.[14] This is not the place to attempt an extended examination of the question of construing penal statutes but some comment on the status of the orthodox rule may be offered without any claim to finality. There is in fact considerable doubt as to the existence of the rule today. Thus in *Craies on Statute Law* the following occurs [15]:

> " The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all staatutes, whether penal or not, are now consumed by substantially the same rules."

There is a not inconsiderable number of cases involving serious offences in which the orthodox rule played no part although, at first sight it was very pertinent.[16] In particular it has had little or no influence on the construction of the various sections of the Larceny Act, 1916.[17] Moreover, in relation to statutes providing lesser penalties for activities which in sum constitute a social evil or nuisance, the acts concerned being punishable summarily, the courts have not only avoided a strict interpretation but have tended to seek effectiveness by applying the mischief rule. A recent example of this is provided by *Smith* v. *Hughes*[18] in which the Divisional Court decided that in section 1 of the Street Offences Act, 1959, the words " solicit in the street " covered the case where prostitutes solicited men passing in the street by tapping on the window of their premises and making signals. There is little doubt that this is the approach which the courts will consider appropriate to the Prevention of Crime Act and it was adopted in substance at least by Lord Goddard C.J. in *Woodward* v. *Koessler*,[19] one of the few leading cases on the meaning of the Act, to be considered below. Admittedly section 9 of the Night Poaching Act, 1828, quoted above, relating to similar subject matter, has received a narrow construction[20] but this probably reflects the desire of courts in the nineteenth century to mitigate the harshness of the criminal law of the time.

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[13] 9 Geo. 4, c. 69; Russell, pp. 1185, 1190–1192.

[14] Halsbury's *Statutes*, 2nd ed., Vol. 24, p. 157; citing *Tuck & Sons* v. *Priester* [1887] 19 Q.B.D. 629 at p. 638, *per* Lord Esher M.R., and *Remington* v. *Larchin* [1921] 3 K.B. 404.

[15] 5th ed., 1952, p. 503. See also Maxwell, *The Interpretation of Statutes*, 9th ed., pp. 279–289; Lenhoff, *Comments, Cases and Other Materials on Legislation*, 1949, pp. 281–282, 871, 937–938 (American material); Willis, 16 *Canadian Bar Review* (1938), p. 24; Jackson, 6 *Cambridge Law Journal* (1936), pp. 84–85. For a general discussion of policy aspects: Livingston Hall, 48 *Harvard Law Review* (1935), p. 748–770.

[16] For example: *R.* v. *Lynch* [1903] 1 K.B. 44; *R.* v. *Casement* [1917] 1 K.B. 98 (treason); *R.* v. *Oakes* [1959] 2 Q.B. 350 (Official Secrets Act, 1920); *R.* v. *Bassey* [1931] 47 T.L.R. 222 (forgery).

[17] *Cf. R.* v. *Williams* [1953] 1 Q.B. 660.

Possession of offensive weapons

The preamble to the statute refers to " the carrying of offensive weapons in public places " and section 1 (1) refers to any person who " has with him " in any public place any offensive weapon. The preamble is the more explicit in expression since it implies a physical act of carrying on the person. The text of section 1—" has with him "—still seems to connote a carrying but is not necessarily so confined. The courts will, no doubt, simply ask if the accused had a weapon in his " possession " and certainly the Act will be strengthened in its effect if the concept of effective control of and access to such a weapon in a public place is imported. There is probably a possession within the meaning of the Act if the accused has a weapon in a car on the highway a short distance from the place where he incurs the suspicion of the police.[21] There will also be a possession if the weapon is carried by an innocent agent,[22] a friend of the accused for example, who accompanies him in the public place concerned in a case in which the weapon comes within the Act by reason only of the intent with which the accused " has it with him."

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[18] [1960] 1 W.L.R. 830. Lord Parker C.J., at p. 832, said: " For my part, I approach the matter by considering what is the mischief aimed at by this Act." See also *McQuade* v. *Barnes* [1949] 1 All E.R. 154 (by-law) and *McPherson* v. *Copeland*, 1956 S.L.T. 151 (Dunoon Burgh Order Confirmation Act, 1954). Constrast: *Fine Fare, Ltd.* v. *Brighton Corporation* [1959] 1 W.L.R. 223; *Criminal Case and Comment* (1959), p. 168.

[19] [1958] 3 All E.R. 557.

[20] Russell, *op. cit.*, pp. 1190–1192.

[21] *Cf. Justice of the Peace*, Vol. 20, p. 236.

[22] *Cf.* the rule in receiving: *R.* v. *Miller* [1853] 6 Cox. 353; *R.* v. *Rogers* [1868] L.R. 1 C.C.R. 136.

Nor should a different view be taken if the weapon, whether in the hands of an agent or not, is not itself " in a public place " when, for example, the accused has left it in a vehicle on private premises or just inside an open window in nearby premises. The test would seem to be ease and immediacy of access to the weapon, *i.e.*, physical control.[23] Questions may also arise as to the application of the Act to cases of joint control. Joint control may arise either when several persons carry parts which when fitted together constitute an offensive weapon within the meaning of the Act or when a group of persons include one who actually carries a weapon of which the group knows and to which each member has ready access.[24] For the purpose of section 9 of the Night Poaching Act, 1828, it was held that if any one of several defendants had a gun all were armed within the meaning of the statute.[25]

If there is trial by jury presumably the question of possession or control will be one for the jury as in the case of receiving.[26]

Possession and mens rea

The general purport of the statute is that the accused need not be shown to have had knowledge that the weapon he had with him was an offensive weapon, although in the case of a weapon not made or adapted for use for causing injury to the person it may come within the class of offensive weapons if it was " intended by the person having it with him for such use by him " (s. 1 (1)). Apart from the latter circumstance, must the accused know that he has an offensive weapon in his control [27] to be found guilty under the statute: can he prove that the weapon was placed on his person without his knowledge? The preamble in its reference to " carrying " would suggest an affirmative answer, but the text uses the more passive formula " has with him " and of course it is always a matter of doubt as to whether a statute excludes *mens*

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[23] *Cf.* on receiving: *R.* v. *Gleed* (1916) 12 Cr.App.R. 32; *Hobson* v. *Impett* [1957] Crim.L.R. 476. See for the analogous case of drunk " in charge of " a motor-vehicle before and after the Road Traffic Act, 1956, Davies, *The Law of Road Traffic*, pp. 199–200.

[24] *Cf.* joint possession of thief and receiver: *R.* v. *Payne* (1909) 3 Cr.App.R. 259.

[25] *R.* v. *Smith* (1818) Russ. & Ry. 368 (decided on an earlier statute); *R.* v. *Goodfellow* (1845) 1 Car. & Kir. 724; 9 J.P. 297; Halsbury, 3rd ed., Vol. 18, p. 147.

[26] *R.* v. *Crane* (1912) Cr.App.R. 113; *R.* v. *Flatman* (1913) 8 Cr.App.R. 256; *R.* v. *Freedman* (1930) Cr.App.R. 133; *R.* v. *Brooker* [1956] Crim.L.R. 489.

[27] The word begs the question but is convenient here.

rea.[28] It is possible that a court would resolve the difficulty by accepting such lack of knowledge as a " reasonable excuse " within the meaning of section 1 (1). At the same time one cannot be certain of this since a court may still hold that a statute creates strict responsibility even if it employs the phrase " without lawful excuse." [29]

Another approach is to argue simply that there was no *actus reus*—no possession—where knowledge of the presence of the weapon is lacking. There is some authority for saying that a person may possess things of which he is not aware provided they are in some close physical relation to his person, property or land. Thus it has been assumed that the purchaser at an auction of a bureau containing money in a secret drawer obtained possession of the money.[30] However, most of the cases on the problem relate to larceny and the tendency of recent authority is to insist that taking possession for the purpose of the law of larceny occurs only if there is control coupled with knowledge.[31] There is no reason why there should be an omnibus definition of possession for all legal contexts and considerations of policy should influence the courts in framing a definition for a particular purpose.[32] In the case of the Act under discussion it would seem reasonable to demand knowledge unless, as is unlikely, the policy of the law is so strict that the mere presence of a weapon on a person in a public place constituted a danger although no one is likely to use it.[33]

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[28] The omission of the word " knowingly " is not of itself conclusive: *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918.

[29] *Winkle* v. *Wiltshire* [1951] 1 K.B. 684, D.C. By s. 65 (1) of the Post Office Act, 1908, as applied to national insurance stamps by the Industrial Injuries (Stamps) Regulations, 1948, " A person shall not. . . . (*b*) have in his possession, unless he shows a lawful excuse; any fictitious stamp; . . ." It was held that a person who proves that he innocently bought fictitious insurance stamps from an unauthorised or unlicensed seller does not establish a " lawful excuse." To avail himself of this defence he must show that he acquired the stamps, as a result of a lawful transaction between himself and a seller legally entitled to deal in the stamps. It may be that a distinction from the instant case exists in that an innocent buying of fictitious stamps from an unauthorised person is less probable that an innocent possession of an offensive weapon as a result of legerdemain in a public place; but the suggestion is made without much confidence.

[30] *Cartwright* v. *Green* (1802) 8 Ves. 405. See also *R.* v. *Mucklow* (1827) 1 Moo. 160; R. v. *Davies* (1856) Dearsly 640; *R.* v. *Fish* (1900) 64 J.P. 137; *Williams* v. *Phillips* (1957) 41 Cr.App.R. 5.

[31] See *R. v. Moore* (1861) Le. & Ca. 1; *R.* v. *Ashwell* [1885] 16 Q.B.D. 190; *R.* v. *Hudson* [1943] K.B. 458; *Russell* v. *Smith* [1958] 1 Q.B. 27. See also *R.* v. *Carpenter* [1960] Crim.L.R. 633, C.C.A. (unauthorised possession of a drug; Dangerous Drugs Regulations, 1953, reg. 3).

[32] Thus the House of Lords in *United States and Republic of France* v. *Dollfus Mieg et Cie.* [1952] A.C. 582, did not consider that the concept of possession found in the run of bailment could be applied to the law relating to sovereign immunity (see Earl Jowitt at p. 605).

Having an offensive weapon: an enterprise or state of affairs

The term offensive weapon includes (a) any article made or adapted for use for causing injury to the person, and (b) an article intended by the person having it with him for such use by him. If a person carrying an offensive weapon with a lawful excuse should suddenly decide to use the weapon to injure a person and attempt or actually succeed in carrying out, an attack, the correct charge will be one under the Offences against the Person Act, 1861. This follows from the decision of the Court of Criminal Appeal in *R.* v. *Jura*[34] where the weapon concerned fell within the second class. The appellant had gone with a woman to a shooting gallery in a public park. After firing some shots at the target, in a moment of anger he turned round and fired at the woman as she was walking away, wounding her slightly in the hip. He was tried at Leeds Assizes on four counts, was convicted on the fourth count for carrying an offensive weapon and appealed against the conviction. The trial judge had directed the jury that:

> "If this was an accident, pure fortuity, then he is not unlawfully in possession of an air rifle. His possession only becomes unlawful if, in your opinion, he turned the rifle deliberately upon the woman. Then immediately his possession of it becomes unlawful and he is in possession of an offensive weapon in a public place."

It was held that the direction was bad in law and the appeal was allowed. Lord Goddard C.J. said:

> "If a person having a rifle in his hand for a lawful purpose suddenly uses the rifle for an unlawful purpose, the Offences against the Person Act, 1861, provides appropriate punishment. The Act of 1953 is meant to deal with a person who goes out with an offensive weapon . . . without lawful excuse."

In *Woodward* v. *Koessler*[35] the accused, a boy of sixteen years of age, had tried to break into a cinema by means of an iron bar and a sheath knife and had used the latter to threaten the caretaker. The Divisional Court apparently took the view that there was no *sudden* decision to use the sheath knife as an offensive weapon [36] and that the decision in *Jura* was given its proper effect. However, the court did not give the point much attention and *Jura* must remain the guide. Donovan J. took the view that the words " having it with him " did not mean that the boy must have taken the knife out with him with the intention of causing injury, it was sufficient to see what use was in fact made of it for the purpose of ascertaining what the intention was. This appears at first sight to contradict *Jura* but it may be regarded solely as a discussion of the problem of proving intention to injure.

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[33] Here as in other cases the difficulty of working with the concepts of *mens rea* and *actus reus* is apparent. Possession is a question of *actus reus* yet again it involves questions of knowledge and advertence. See *R.* v. *Dadson* (1850) 2 Den. 35 and Glanville Williams, *Criminal Law: The General Part*, p. 23.

[34] [1954] 1 Q.B. 503; [1954] 1 All E.R. 696; [1954] Crim.L.R. 378. See also the decision of Coventry City Magistrates to the same effect: reported, *Justice of the Peace*, Vol. 117, p. 601; and *ibid.*, Vol. 122, p. 510.

[35] [1958] 1 W.L.R. 1255; [1958] 3 All E.R. 557; [1958] Crim.L.R. 754; [1958] Crim.C. & C. 86; *Justice of the Peace*, Vol. 122, p. 647.

Jura then establishes that " having it with him " involves a state of affairs, in which the accused " goes out with an offensive weapon " without lawful excuse. There will no doubt be awkward cases in which there is no evening's enterprise, or setting out with weapons, but nevertheless, a state of affairs distinct from the sudden decision to shoot in *Jura*. For example a group of men in a public-house after quarrelling with another group might decide, and make public their intention, to set upon another person or persons later in the evening when the opportunity arose. Objects not offensive weapons within class (a) above, such as a carpenter's tools, would, by virtue of the formation of an intention to cause injury, come within class (b). It would seem that any appreciable lapse of time, which shows clearly that action is not to follow and eventually accompany decision, as in *Jura*, will suffice to bring the case within the Prevention of Crime Act.

In any public place

Section 1, subsection (4) provides *inter alia* that " in this section ' public place ' includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise ; . . ." For the purpose of section 1, subsection (4), of the Street Betting Act, 1906, " public place " does not include a public-house.[37] The wording of the present Act is wide enough to cover a public-house since it includes places to which the public " are permitted to have access." Car parks attached to public-houses are probably included also.[38] Indeed it would seem that any place to which the public are invited, whether or not payment is a condition of entry, is a "public place" within the Act.[39] Obviously a dance hall will be a "public place."[40] It is probable that an omnibus[41] and a pleasure steamer[42] are "public places." The definition will also include public parks and libraries, fairs, markets, railway stations and post offices. Its width suggests the inclusion of cinemas, department stores, shops and banks but some awkward line drawing may occur in the case of business premises and the suggestion is somewhat tentative.

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[36] On this aspect of the case see below. As reported the case contains very little evidence at to the time at which the intention was formed: indeed the first use to which the knife was put was that of trying to force the cinema door. The threat made with it might seem incidental, depending on the appearance of the caretaker.

[37] *Brannan* v. *Peek* [1947] 2 All E.R. 572.

What are offensive weapons?

Section 1, subsection (4) defines "offensive weapon" to mean "any article made or adapted for use causing injury to the person, or intended by the person having it with him for such use by him."

The first class of articles, those made for the prime purpose of causing injury to the person, includes bludgeons, clubs,[43] bayonets, daggers, firearms other than those commonly used for game, coshes[44] and knuckledusters. It is sometimes assumed that flick-knives are within this class.[45] In fact, knives of this type, more properly called spring-clip knives, are used extensively by farmers, fishermen, butchers and electricians.[46] This means that the prosecution must treat them as within the third class, to be discussed shortly. Furthermore, it is very doubtful if sheath knives are within the first class and in *Woodward* v. *Koessler* the Divisional Court took the view that a sheath knife was not made for the purpose of causing injury and was, therefore, in the third class. In the particular case this view was correct since the knife was of a type commonly used by boy scouts.[47] At the same time this may involve a court in some technicalities in distinguishing such knives from daggers to which they are akin.

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[38] See *Elkins* v. *Cartlidge* [1947] 1 All E.R. 829: a decision under s. 15 (1) of the Road Traffic Act, 1930 (in charge of a vehicle in a public place while under the influence of drink). *Cf. Macdonald* v. *M'Ewan*, 1953 S.L.T. (Sh.Ct.) 26.

[39] *Cf. Glynn and Another* v. *Simmonds* [1952] 2 All E.R. 47: a decision under s. 4 of the Vagrancy Act, 1824 (Tattersall's enclosure at Goodwood a "place of public resort"); *R.* v. *Collinson* (1931) 23 Cr.App.R. 49; followed in *Elkins* v. *Cartlidge, supra* (invitation to watch point-to-point races in a private field); *McIntyre* v. *Marton*, 1912 S.C.(J.) 58: Vagrancy Act, 1824, s. 4 (entrance hall and staircase of an hotel); *Campbell* v. *Kerr*, 1912 S.C. 10: Street Betting Act, 1906 (shed on a quay).

[40] *Justice of the Peace*, Vol. 122, p. 328.

[41] *Cf. R.* v. *Holmes* (1853) Dears.C.C. 207, at p. 209, *per* Parke B. (indecent exposure).

[42] *Contra, R.* v. *Taylor and Jones* (1857) 21 J.P. 488: under the Vagrancy Act, 1824, s. 4.

[43] See *R. v. Hutchinson* (1784) 1 Leach 339, at p. 343 n.

[44] *Cf. Justice of the Peace*, Vol. 123, p. 370; Vol. 121, p. 733.

[45] See last note.

[46] H.C.Deb., Vol. 566, col. 508; Home Secretary, March 7, 1957; and see Captain Athelstan Popkess [1959] Crim.L.R. 641. Typical flick-knives may be seen in [1959] Crim.L.R. 645. For an elaborate definition: s. 1, the Restriction of Offensive Weapons Act, 1959 (7 and 8 Eliz. 2, c. 37); in operation June 14, 1959 [1959] Crim.L.R. 535.

The second class of articles consists of those adapted for use for causing injury to the person. This is intended to cover the case in which an article not of the first class by its original function has been altered or otherwise adapted for causing injury. The class includes such objects as bottles with broken tops, bicycle chains with the edges of the links sharpened, razor blades in sleeve ends and potatoes and knives with domestic or trade purposes specially filed or sharpened.[48]

The third class consists of articles which may conceivably have some domestic or trade use and which are not made with the very purpose of causing injury to the person. In regard to the first two classes of article the accused must show lawful authority or reasonable excuse; in relation to the third class the prosecution has the task of proving that the accused had the article with him with the intention of using it for causing injury, the article is not an offensive weapon within the meaning of the Act otherwise. Knives with domestic or trade purposes, tools of various sorts,[49] bicycle chains, parts of machinery, drums or bags of pepper,[50] dangerous acids and other chemicals, thunder flashes, hafts of tools, clubs, bats and mallets used in various sports, walking sticks, bottles and razors come within the class. Even when the article comes within the class the prosecution will, in cases concerning sheath knives, razors, flick-knives and the like, very easily shift the tactical or particular burden of proof on the issue onto the accused since in practice many inferences will be against him. In many cases, as in *Woodward* v. *Koessler*, the accused will have lightened the task of the prosecution by using or attempting to use the article for an offensive purpose. In *R.* v. *Hodgson*[51] a man who discharged a shotgun from his car when following another car was charged under the Act. Pearson J. directed the jury that a shotgun is not an article made for causing injury to the person and, therefore, the prosecution must establish an intention on the part of the accused, at the time of the firing,[52] to use it for causing injury to the person. The question whether the accused had such an intention is for the jury to decide.

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[47] For a case in which a different view was taken: *Justice of the Peace*, Vol. 120, p. 250. See also [1958] Crim.C. & C. 87; and *Farrell* v. *Rennicks*, *infra* note 53.

[48] See the scythe in [1959] Crim.L.R. 646.

[49] *e.g.*, a pair of garden shears: *Justice of the Peace*, Vol. 117, p. 521.

[50] See case in *Justice of the Peace*, Vol. 120, p. 250.

[51] [1954] Crim.L.R. 379, Leeds Assizes, March 3, 1954.

In applying the Act several steps may thus be taken. The determination whether the article falls within either the first or second class is a matter of judicial notice. The burden of proof on the issue whether the accused had such intention as to bring the article within the third class is on the prosecution. Lastly, assuming the article falls within one of the three classes the accused must show lawful authority or reasonable excuse.

Intention to use for causing injury to the person

For an article not made or adapted for causing injury to be brought within the third class it must be shown that the accused had it with him with the intention of causing injury to the person. Thus it is possible for an accused to escape conviction by proving that a sheath knife in his possession was intended for use as a housebreaking tool and not for the purpose of causing injury to the person.[53]

The main point of contention in *Woodward* v. *Koessler* was whether the boy had carried the sheath knife with the intention of causing injury to the person. The principal evidence of his intention was the actual use made of the knife. The boy had used the knife in an attempt to force the door of the cinema. When the elderly caretaker came to the door, the boy, who was holding the knife in his hand, went up to the caretaker in a threatening manner, as if to strike with the knife, and said, " Can you see this? " The question was whether this involved " causing injury to the person." The Divisional Court was of opinion that it did. Lord Goddard C.J. said:

> " The fact is that (the magistrates) have taken much too narrow a view of the words " causing injury," because obviously the boy did intend to cause injury; frightening a person, intimidating a person, is causing injury. If we were to hold that this young boy with this shocking weapon going up to an elderly man and saying: ' Can you see this? ' was not being in possession of an offensive weapon for causing injury, it would be driving a coach and four through this useful Act. It would mean that it would hardly ever be possible to secure a conviction."

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[52] But see *R.* v. *Jura, supra.*

[53] *Farrell* v. *Rennicks*, 1959 S.L.T.(Sh.Ct.) 71; [1960] Crim.L.R. 133; *Journal of Criminal Law*, April 1960, p. 126.

This view of the meaning of "causing injury" may involve an extensive interpretation of the Act and a narrow interpretation in the case would have been equally reasonable.[54] However, the crucial question should be: is there adequate evidence of *an intention* to cause personal injury? A threat may be a part, perhaps the vital part of such evidence, whether or not any personal injury is actually caused. The passage from Lord Goddard's judgment just quoted is perhaps primarily concerned with this aspect of the matter. It is implicit in his words that the policy of the Act will fail if the standard of proof of such intentions is placed very high.[55] On the other hand Donovan J., it is respectfully submitted, goes too far in saying baldly that all one has to do to ascertain intention is to see what use in fact was made of it. This will not be sufficient in the case where a sudden decision is made to use an article originally carried with an innocent purpose to cause injury, as in *Jura.*[56]

Lawful authority or reasonable excuse

A person who has with him in a public place an offensive weapon has the burden of proving "lawful authority or reasonable excuse." The standard of proof here is the 'civil standard': the accused can show that on a balance of probabilities the facts support his defence. Unfortunately these terms are difficult to construe with much certainty. The words do not necessarily connote absence of strict responsibility.[57] One view is that the term lawful authority here means authority supported by law and that innocent motive is no defence.[58] Moreover, the word "excuse" has been held to be coterminous with authority.[59] However the phrase "or reasonable excuse" would seem to stand independently by virtue of the use of the term "reasonable." Moreover it has been generally understood that persons carrying offensive weapons should have the opportunity of showing innocent purpose. There is, therefore, an alternative and, it seems, prevailing view that any explanation showing innocent motive is a "reasonable excuse."[60] Thus a magistrates' court has accepted an explanation to the effect that the accused when calling on his brother had seen him shave with a razor and had borrowed it in order to experiment in shaving with a "cut-throat" razor.[61] In *Jura*[62] the Court of Criminal Appeal assumed that a person using a rifle at a shooting gallery was carrying it with a reasonable excuse. The same case also established, it will be recalled, that a sudden decision to use an article lawfully carried for causing injury does not alter the fact that until that moment there was no unlawful possession. "Lawful authority or reasonable excuse" refers to the possession and not the use.

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[54] See [1958] Crim.C. & C. 87; [1958] Crim.L.R. 755. See also *R.* v. *Yeo* [1951] 1 All E.R. 864, Manchester Assizes, Gorman J. (threat to murder not a "personal injury" at common law); and *R.* v. *Jarmain* [1946] K.B. 74 (C.C.A.) ("the use of a loaded firearm in order to frighten the person victimised into submission is a violent measure"). Judicial readiness to make statutes of the present type effective has been noticed above.

[55] It may be remarked that in relation to the Vagrancy Act, 1824, s. 4, dealing with suspected persons and reputed thieves, proof of frequenting or loitering with intent to commit a felony is based on very general inferences. See the Prevention of Crimes Act, 1871, s. 7; and Danks [1958] Crim.L.R. at pp. 122–123.

[56] See above.

[57] *Supra*, note 29.

[58] *Halsbury's Statutes*, 2nd ed., Vol. 33, p. 34, citing *Dickins* v. *Gill* [1896] 2 Q.B. 310 and *Winkle* v. *Wiltshire* [1951] 1 All E.R. 479. *Cf.* the Public Order Act, 1936, s. 4 (2).

[59] *R.* v. *Harvey* [1871] L.R. 1 C.C.R. 284.

Difficulty arises in several ways. In regard to the first and second classes of offensive weapon the effectiveness of the Act will be considerably reduced if the second of the two interpretations considered above is carried too far in practice and courts accept facile explanations of the possession of weapons. Again the question of reasonable excuse, where the burden of proof is on the accused, may become confused with the question to which class of weapon the article belongs. In the case of a razor, which comes within the third class, which has not been used in a threatening manner or for causing injury, the accused may argue simply that the article is not within the first two classes. Indeed he may expect the court to take judicial notice of the fact. But this is not the same as showing reasonable excuse. Confusion on this point occurred in *Jura*[63] and the razor mentioned above. Why should the accused have a burden of proof when the matter is one of judicial notice? In practice, of course, the distinction may not matter since the standard of proof demanded of the accused is not high. Further difficulty arises when the accused is attempting to disprove any intention to cause injury when the article possessed is of the third class. If this is treated as identical with showing reasonable excuse then the accused is deprived of the tactical advantage which he has in regard to this class of weapon, the burden of proving intention being on the prosecution.[64] These difficulties would be encountered less frequently, though not entirely avoided, if the narrow construction of the words "lawful authority or reasonable excuse" were adopted. Lastly, a court may be faced with a plea that the accused expected danger of assault or molesting and carried the weapon as a means of self-defence. It is impossible to deny that this is a "reasonable excuse" and yet care must be taken lest the policy of the Act be undermined since precautions of this kind may merely create the possibility of strife.

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[60] See *Wong Pooh Yin* v. *Public Prosecutor* [1955] A.C. 93; [1954] 3 W.L.R. 471; [1954] 3 All E.R. 31; P.C. Malayan Emergency Regulations; "lawful excuse" for possession of firearms held to include an intention to surrender with arms in compliance with official invitations to do so.

[61] *Justice of the Peace*, Vol. 122, p. 510.

[62] *Supra.*

[63] An air rifle provided for use in a shooting gallery is within the third class of article.

[64] *Cc. Justice of the Peace*, Vol. 117, pp. 601–602.

Mr. Sutterthwick's Court

By A. E. JONES, *Magistrates' Clerk*

ROBBERY WITH VIOLENCE

Evidence for the prosecution

"Had you ever seen this defendant before last night?" asked the clerk, pointing to the tallest of the three young men in the dock.

"No sir," replied the witness.

"When and where did you first see him?" continued the clerk.

"I'm sorry, but I must object to that question," said young Mr. Forbes Gale, jumping up in counsel's bench and addressing the magistrate. "Mistaken identity is the essence of the defence in this case; I can't agree to leading questions on the subject."

"The charge sheet shows that the witness signed it as prosecutor, so he must, at least, have seen the defendant at the police station. I didn't suggest any time or place in my question. I don't see, therefore, how it can be said to be a leading one," protested Frell, looking rather hurt.

"I think Mr. Frell is right," said Mr. Sutterthwick, "Your client can't be prejudiced by the way the question was framed, Mr. Forbes Gale."

"As you please, sir," said counsel and resumed his seat.

The clerk spoke again to the witness. "Had you seen the defendant last night before you saw him at the police station?" he asked this time.

"Yes," was the reply.

"When and where was the first time?"

"Well, it would be between a quarter and half past ten, sir—I can't say the time exactly—at the public convenience in Relief Road."

"Tell us what happened on that occasion."

"Well, sir, I had some time to kill before my train went, and I hadn't been this way for a good many years, so I decided I'd have a look round a few of the places I used to know, as I thought maybe I might meet some old pals and acquaintances, so I went in one or two pubs and coffee shops and looked round, but I didn't see anybody—at least not anyone I recognised. . . ."

"You were asked to say what happened when you saw the defendant at the urinal in Relief Road. Will you please cut your ramble short and come to that point," interrupted the magistrate.

"Yes, sir. I was just going to, sir. I only wanted to explain how I came to go there."

"I'm prepared to believe it was to make water," said Mr. Sutterthwick.

"Yes, sir. You see I had one or two cups of tea, and it was rather a cold. . . ."

"You've made it abundantly clear what you went there for; will you now kindly tell us what happened when you got there."

"Oh, yes sir, certainly. Well, as I was going in I noticed these three chaps hanging about outside, but it was rather dark and I didn't take much notice of them. So then I . . . er . . . did what I came for; and when I'd buttoned myself up I decided I'd go out the other way, because, you see. . . ."

"Never mind why. You went out the other way. What happened then?" snapped the clerk.

"Well, I never actually got outside, sir, because, just as I was at the entrance where it's rather narrow, I was grabbed from behind—he must have come in the way I came in, but I never noticed him because the light wasn't good and never dreamt this would happen. Then the other two suddenly appeared in front of me and one of them got hold of my arms. . . ."

"Just a moment," said the clerk, who was, at last, being given some material for his notes of evidence, "Who were these men you're speaking of?"

"Well, they must have been the three who were hanging about outside, but I didn't know them and I'd never spoken. . . ."

"Do you see any of them in court now?"

"Yes, they're over there," said the witness, pointing towards the dock.

"All three of them?"

"Yes. The tall one my end is the one that came behind me."

"How can you recognise him, if he came behind you?"

"Because he pulled me round facing him, and he held me by the tie very tight, with his face very close to mine, and he threatened he'd kill me if I struggled or shouted out. Then he and the one who'd grabbed my arms went through my pockets and they took my wallet and some loose change I had in another pocket and a fountain pen that was given to me by. . . ."

"Which one of these three helped go through your pockets?"

"The middle one, sir—the one with the check shirt."

"What about the third man; what did he do?" asked the magistrate.

"Well, sir, he had what looked like a knife in his hand when they first came up to me, and he poked it towards my stomach and said 'You'll be all right, chum, so long as you don't make a fuss.' He was the one, too, who said 'He's got a wristwatch. Better have that as well.'"

"Did they take your watch then?"

"He did—the one with the knife did."

"What happened next?"

"I said 'Please give me my return ticket back or I shan't be able to get there if you take my money.' It was in my wallet; so the tall one said 'Better give him the ticket. We don't want him hanging around here' and he put it in my pocket. Then he said 'If you go to the police we'll get you if it's the last thing we do'; and he hit me twice in the face with his fist, saying 'That's just to show you we mean what we say.' Then they all ran off."

"Do you recognise that wallet?" asked Frell, noticing the arresting officer with the exhibit ready to proffer.

"Yes sir. It's the one they took from me."

"Is anything missing from it?"

"Yes, everything. It's empty now."

"What did it contain when it was last in your possession?"

"There were ten £1 notes and five 10s. notes, sir, and a lot of my private papers."

The arresting officer held out another article, and the witness identified it as the missing wristwatch.

"What was the total value of all the property taken from you?" asked the clerk.

"Well, the fountain pen I don't really know what it cost, and the watch I'd had a good time but the wallet was almost new and I don't know quite. . . ."

"I see from the charge sheet that you put the total value at £19 15s. last night. Is that about right?" interrupted the clerk.

The witness seemed almost disappointed that the point had to be disposed of by a simple affirmative.

"What happened after they ran away?" was the clerk's next question.

"Well, I was a bit dazed at first, sir, because of the blows. Then I went after them and shouted 'Stop thief.' I was running and I lost sight of them and I began to get a bit puffed but a fellow passing by said. . . ."

"You mustn't tell us what he said. It isn't evidence," interposed Frell quickly. "What did you do as a result of what he said?"

The witness looked very puzzled and said "Well, he told me. . . ."

"We don't want to hear what he told you. What did you do?" said the clerk.

"I didn't do anything," replied the witness sulkily.

"Did you catch up with these men?"

"No."

"Did you inform the police?"

"No; not then."

"When, then?"

"I went on a bit farther and came to a phone box and I rang up the station from there."

"What happened next?"

"They told me to wait there till the patrol car came," answered the witness before the clerk could tell him not to repeat what the police had told him, because it wasn't evidence.

"What happened when the police car came?" asked Frell, ignoring the last reply in his notes of evidence.

"We drove round for about twenty minutes, trying to find these men, then, all of a sudden, I spotted them in the Square, and the police stopped them and asked me if I was sure they were the ones. . . ."

"Could they have heard this?" interrupted the clerk.

The witness considered and finally said "No, I don't think so, because they were on the pavement then and I was still in the car."

"We can't have that, then. But you can say now whether they were the same three men. Are you quite sure?"

"Yes, absolutely. I should know them anywhere after what they did to me."

Cross-examination

The clerk looked inquiringly at Mr. Sutterthwick to see whether there would be any further questions from the Bench; Mr. Sutterthwick looked at Mr. Forbes Gale to indicate that the time had come for cross-examination.

"It occurs to me, sir, that it might be desirable for the two men who have pleaded guilty to be out of court from now onwards," said counsel. "I shall probably be calling them as witnesses for my client, and I imagine that their evidence would carry more weight with you if they did not hear my cross-examination and the evidence of the accused." The proposal was accepted by the magistrate without discussion, and the two shorter men were escorted from the dock through the door leading to the detention room and cells. Mr. Forbes Gale's cross-examination then proceeded on the lines which are customary when a stranger, seen for a short period in poorly lit surroundings is alleged to have been recognised some time later without any of the safeguards of an identification parade. The witness remained unshaken in his conviction that the accused was one of his assailants, but the scope for error was fully brought out by counsel.

The detective sergeant who was in charge of the patrol car completed the case for the prosecution. He related that he had stopped the three men at 10.45 p.m. and that, when told of the allegation, the defendant had said "I was in the Nest Club with these two till half past nine; then I left to take my girl friend home. I got back to the Nest just after half past ten, and I met my mates again there. I had a drink with them and then we decided to go home, and we've only just come from there now." When asked where his girl friend lived, the accused had said, according to the detective sergeant, that he didn't know. He had replied "No sir" when formally charged and cautioned. The watch and wallet produced had been found on his two co-defendants respectively; he himself had £25 in notes on him, including six 10s. notes and seventeen £1 notes.

Mr. Forbes Gale had no question to ask the officer. "I'll call my client straightaway, sir," he announced.

The accused came into the witness box confidently enough but looked very startled when the warrant officer made his standard inquiry as to his religion. However, a gently prompting "C. of E.?" from Sergeant Quing brought the light of comprehension and a relieved "Yes." The oath was duly administered and, in a slightly modified form, the defendant gave the same account of his movements as he had given to the police the previous night. The modification occurred when Mr. Forbes Gale said "You told the officer that you took your girl friend home after leaving the club. Was that true? "

"No, not exactly," replied the defendant.

"Is it true that you did leave the club with a young woman? "

"Yes."

"What time would that be? "

"Half nine."

"Was she your girl friend? "

"Well, not in so many words."

"Had you ever met her before last night? "

"No."

"Where did you meet her? "

"In the club."

"Where did you go with her? "

"To the War Memorial Park."

"And after that? "

"I don't know where she went, but I came back to the club."

"Getting there at about what time? "

"What I told the police—about half ten."

"What is the girl's name? "

"I only knew her as Renie."

"Do you know where she lives? "

"No."

"Could you find her again? "

"Well, she might come back to the club some time."

"Why didn't you tell the police the whole truth about this girl? "

"Well, I didn't like to. I thought it wouldn't sound very nice."

"The police are accustomed to hearing worse things than that," commented Mr. Sutterthwick. "And, in my experience, they don't usually encounter such modesty in young men like yourself."

"I hope, sir, that your last remark doesn't indicate that you have already formed an unfavourable impression of my client's character," said Mr. Forbes Gale.

"I'm only referring to what he has already told us about his relations with this young woman," said Mr. Sutterthwick.

"There's no harm in sitting in the Park, sir," protested counsel.

"Then why did he think it wouldn't sound very nice, Mr. Forbes Gale? "

"He probably expected the police to have suspicious minds, sir," said Mr. Forbes Gale and then resumed his examination of the defendant. "Were you ever in Relief Road last night? " he asked.

"No, sir."

"I believe, in fact, that the War Memorial Park is in exactly the opposite direction when you leave the Nest Club?"

"Yes."

"Had you ever seen the prosecutor in this case before the police stopped you last night?"

"No, never in my life."

"So it follows, I take it, that you know nothing of this theft?"

"Well, only what my mates told me."

"Oh, they told you about it, did they? When was that?" said Mr. Sutterthwick.

"On the way home, after we'd left the club."

"What did they tell you?" pursued the magistrate.

"They told me that, after I went out with this girl, they got talking with a Geordie they didn't know in the club, and he suggested going to this place in Relief Road to see if there were any queers there, as there usually is; so they went along with him, and this chap who's given evidence made immoral proposals to my mates, so the Geordie did him up. And it was the Geordie's idea to take his stuff, but it was really only a joke to teach him a lesson. And my mates said they never had none of his money but, after they got back to the club, the Geordie gave them the wallet and watch as a sort of souvenir."

"What did you do when they told you this?" asked the magistrate.

"What could I do? It wasn't none of my business."

Mr. Sutterthwick leaned back in his big chair; Mr. Forbes Gale said "I have no further questions to put to the accused."

The defendant returned to the dock and his place in the witness box was taken in turn by his two co-defendants. Their evidence tallied in every detail with his—so much so that, if they had been police officers, counsel would undoubtedly have commented adversely on the fact.

Mistaken identity

The three young men stood together again in the dock as Mr. Forbes Gale rose to say "I have no other witnesses to call, sir. It only remains for me to address you on the evidence. . . ."

"Your defence, I take it, is the *Adolph Beck* case—and some other similar but not so notorious instances of mistaken identification?" interposed the magistrate.

"Substantially, yes, sir," agreed counsel, and he added, "But there are one or two discrepancies in the evidence I should like to draw your attention to."

"I needn't trouble you any further, Mr. Forbes Gale," said Mr. Sutterthwick.

"Thank you, sir," said counsel, sitting down.

Mr. Sutterthwick looked towards the dock and said "I can't feel sure that there is no possibility of a mistake here. The defendant must have the benefit of whatever doubt there is; the case against him is dismissed. . . . What is known about the other two?"

The tall young man left the dock with an encouraging gesture to his two comrades; the detective sergeant returned to the witness box and said "They haven't told us very much about themselves up to now, your worship. I believe there are previous convictions, but the details haven't come through yet. I would respectfully ask for a remand to make further inquiries. . . . I understand that the probation officer can tell you something about them."

Thorburton got up and said "They are on probation to me at present, sir, having been convicted a few months ago of a rather similar offence. I'm in some difficulty in reporting on them. The last time they were charged it was with the young man who has just left the dock; he was convicted on that occasion. . . ."

"That was a case of larceny from the person in the War Memorial Park, wasn't it?" interrupted Mr. Sutterthwick.

"Yes sir. I don't wish to appear to be questioning your adjudication in this present case, in any way. I realise that one of these three has been found not guilty today, but, in fairness to the other two, I feel bound to report that, in my opinion, he is undoubtedly the ringleader in most of their activities; and these men before you now are, I think, merely rather weak characters who might very well be leading decent lives if it weren't for his evil influence."

"You may be right, Mr. Thorburton. I couldn't help recognising all three of them as it was such a comparatively short time ago that they last appeared before me. But I had to put that out of my mind and try to view the case as a jury would. . . . There must clearly be a remand for inquiries in the case of these two; I'll have a full report on them from you and the police next week."

The defendants made no demur to the proposed seven days in custody. As P.C. Mure led them away, the magistrate looked towards Inspector Campting and said "I do wish something could be done about this urinal in Relief Road, Inspector. We're always getting cases of one sort or another from it—usually very unpleasant ones. If it is essential in the neighbourhood to meet a legitimate demand, couldn't some improvements be made, at least in its layout and lighting? "

"The police have already taken the matter up with the Borough Council; but I'll see that your worship's remarks are conveyed to the Town Clerk," said Inspector Campting.

Mr. Sutterthwick bent towards Frell and said in a low voice "Why on earth did the police only charge these men with larceny from the person? It was a clear case of robbery with violence."

"The prosecutor is leaving tomorrow on a luxury liner which is going on a five months' cruise. If the charge had been one which had to go for trial, there would have been no evidence by the time it came before a jury, sir. As it was, the police were scared that the defendants might get to hear of the prosecutor's departure, in which case they would undoubtedly have asked to go for trial," replied the clerk, to whom the detective sergeant had confided his difficulties before the court sat.

"But he described himself as a hairdresser, and he didn't look as if he could afford a five months' luxury cruise," said the magistrate.

"He's a ship's hairdresser, in fact," explained Frell.

Mr. Sutterthwick meditated a moment and then said quietly "What do you think he went there for? "

"Charge Number Seventeen, your worship, Nancy Willing," announced Mure.

What Colour is the "Reasonable Man"?

By Colin Howard, LL.M.,

Senior Lecturer in Law in the University of Adelaide

In his interesting article "Provocation in Trials for Murder,"[1] Mr. C. C. Marsack has drawn attention to an aspect of the law of provocation which is of no little importance to judges who have to apply the common law to indigenous races whose psychology is very different from that of their English conquerors. Occasionally in modern times there have been attempts to transplant English, or at any rate British, institutions, such as jury trial and parliamentary government, to societies which were unaccustomed to them. More often than not the result has been either outright failure or else transformation to suit local conditions to such an extent that the English original has become scarcely recognisable in the new creation.[2] No great insight is needed to perceive that the reason for this is a psychological one which applies as much to an alien system of law as to an alien institution.

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[1] [1959] Crim.L.R. 697.

The manner in which a community organises itself is intimately bound up with its habitual way of thought. This in turn is the result of many circumstances, particularly geographical situation and hereditary characteristics. The principal instrument of social regulation is the law. It should be commonplace that if any particular system of law is to work reasonably and justly, it must conform fairly closely with the habitual way of thought of the people to which it applies. Some parts of the law are more intimately connected with psychology than others. The criminal law is an obvious instance, for some of its rules are expressly designed to cope with psychological problems. These rules, of which the law relating to provocation furnishes an excellent example, are evolved to satisfy the moral sense of the community. The moral sense changes, and so from time to time there is much discussion whether the law adequately expresses what the community feels. The closer the law gets to moral and psychological questions, the more necessary is it to tread carefully if injustice is to be avoided. This is particularly the case where a system of law developed by one community is arbitrarily imposed upon another quite different one.

The common law of provocation in relation to homicide is a compromise. The Anglo-Saxons believe it in general to be wrong to kill human beings. But they also believe it in general to be wrong to treat people as responsible for their actions when it is proved as a matter of fact that they had no control over them. One way of losing control of one's actions is to get into a very bad temper. The compromise consists in laying down the rule that if someone causes you in this way to lose control of yourself and kill him, you are not to be held fully responsible for the killing if a reasonable person would have responded in the same way as you did. We may accept as an absolute value, to be observed wherever the common law is imposed, that one should not normally kill other human beings. We may also accept the exportation of the provocation compromise, for the common law should not be less generous to subject peoples than it is to its own creators. But the law divorced from the people to whom it applies is a mere collection of words. What constitutes provocation to an Englishman may leave a Samoan unmoved, and vice versa.[3] The simple truth, obvious to anyone who has had anything to do with administering the common law overseas, is that to treat other people as if they were Englishmen is at best unrealistic and at worst unjust. It is therefore important to bring to light any modifications of the law which have occurred in response to local circumstances of this kind.

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[2] As to jury trial, see Glanville Williams, *The Proof of Guilt*, 2nd ed., pp. 218–222, and references there cited. As to parliamentary government, apart from such obvious recent examples as British Guiana, Burma and Ghana, consider the history of modern France.

The Northern Territory of Australia is an area of 523,620 square miles, largely desert. In this vast space there lives a white population of about 20,000 and an aboriginal population of about 18,000.[4] The Territory is directly administered by the Commonwealth Government. Aborigines are subject to the same criminal law as whites, which in the Northern Territory, so far as provocation is concerned, is the same as the common law.[5] The Supreme Court of the Northern Territory sits at Darwin. I am indebted to Kriewaldt J., Judge of the Supreme Court from 1952 to 1959, for making available to me relevant extracts from the transcripts of four recent unreported judgments in which he was called upon to deal with the question of how to apply the common law of provocation to aborigines. Since, as Mr. Megarry has observed,[6] "it is the courts and not the reporters who settle the law," it has seemed to me desirable to introduce there judgments to a wider audience.

Murder trials in the Northern Territory run at the rate of about six a year, well over half of which are concerned with aborigines.[7] Not infrequently these homicides occur in circumstances which require a direction to the jury on provocation. Such a case was *Patipatu.*[8] The accused had put his young son in the charge of the deceased woman. For reasons which did not appear, she placed the child[9] by the side of a track and abandoned him there.

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[3] Anyone who doubts this statement is recommended to read Bengt Danielsson's delightful book *Love in the South Seas.*

[4] Including some 1,700 half-castes.

[5] On provocation in Australia generally, see the survey by the present writer in (1960) 33 *Australian Law Journal* 323. The common law has been modified in several interesting respects.

[6] (1954) 70 *Law Quarterly Review* 246, 251. See also *Palgrave, Brown & Son, Ltd.* v. *S.S. Turid* [1922] 1 A.C. 397, 413, *per* Lord Sumner.

[7] *Nelson*, unreported, March 21, 1956.

[8] Unreported, May 15, 1951. In this case and those which follow, the defendants were aborigines.

[9] The age of which did not appear.

Patipatu was so enraged at this action that he threw a spear at the woman which killed her. In the course of his summing-up Kriewaldt J. said: " If you think that in the circumstances prevailing in that particular locality that the abandonment of a young child . . . by the person appointed to look after it . . . would cause an ordinary reasonable person in that vicinity and of that description so to lose control of his emotions as to retaliate with a spear then you would be entitled in this case to find a verdict of manslaughter."

Patipatu was followed by *Macdonald*.[10] After a quarrel and a fight between two aborigines, one of them went home and fetched two boomerangs with which he then returned and killed the other. His Honour's summing-up contained the following passage: " Whether or not provocation exists depends upon whether what happened was sufficient to deprive a reasonable man of his self-control; whether a reasonable person would have been deprived of his self-control by what happened. The strict statement of the rule is that a reasonable man has to be deprived of his self-control. You may use these words, reasonable man, as meaning a reasonable native inhabitant of Australia. You may draw a distinction between the amount of provocation which is needed before the ordinary reasonable human being, such as you are, would lose his self-control, and the lesser, if you think it applies, the lesser degree of provocation needed before an aboriginal of Australia loses his self-control. I may be wrong. I do not know, because there is no decision of which I am aware. You will apply the law in this case that you may adopt a lesser standard as amounting to provocation where a native is charged with murder than you would be entitled to draw where a white person is charged with murder. The provocation here is the earlier fight when the accused received a wound, and the later throwing of a nulla nulla by the deceased. If you think that either one of these two would cause the average reasonable native of Australia to lose his self-control and to retaliate, then you would be entitled to say that there was provocation, and your proper verdict would be manslaughter." A verdict of manslaughter was returned.

In *Patipatu* his Honour gave the first indication that he would modify the law of provocation to try to make it appropriate to the particular community with which he was dealing, when he used the words " an ordinary reasonable person in that vicinity and of that description," and he followed this up in *Macdonald* two years later with the express statement that the degree of provocation required for a white man was not necessarily the same as for an aborigine, even if this meant in practice a more lenient rule for the aborigine. Thus far it was possible to argue that no specific rule of the law of provocation had been changed in the Northern Territory; that it was merely a case of the existing rules being applied more flexibly where appropriate. In *Muddarubba*,[11] however, a different situation presented itself, for two reasons. First, the decision in *Bedder* v. *D. P. P.*[12] had been reported, and second, the provocation consisted principally or entirely of words, the defendant having speared the deceased woman after she had used a native term towards him which constituted an extreme insult.

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[10] Unreported, July 21, 1953.

As to *Bedder* v. *D. P. P.*, his Honour treated it as an example of what was meant by the "reasonable man" in the particular context, and clearly did not regard the case as requiring him to apply the standards of the reasonable Englishman to the reasonable aborigine.[13] It is submitted that this approach is right, for the opposite view leads to absurdity and injustice. Having cleared this obstacle out of the way, the learned judge, after remarking that the rules relating to provocation had given him "some worry in native trials," approached the question of words.

"In my opinion, in any discussion of provocation, the general principle of law is to create a standard which would be observed by the average person in the community in which the accused person lives. It is clear from the cases decided by courts whose decisions bind me that in white communities matters regarded as sufficient provocation a century ago would not be regarded as sufficient today. This suggests that the standard is not a fixed and unchanging standard, it leaves it open, and I think properly so, to regard the Pitjintjara tribe[14] as a separate community for the purpose of considering the reaction of the average man. I tell you that if you think the average member of the Pitjintjara tribe . . . would have retaliated to the words and actions of the woman by spearing her, then the act of spearing is not murder but manslaughter . . . I may be wrong, but until put right by a higher court I shall continue to tell juries that the members of the Pitjintjara tribe are to be considered as a separate community for the purposes of the rules relating to provocation. I shall not apply to them the standard applied to the white citizens of the Northern Territory." His Honour then concluded by leaving it to the jury to decide whether the verbal insult offered by the deceased to the defendant amounted to sufficient provocation, notwithstanding that for "a white person, it has been laid down that mere words are not provocation under any circumstances." It will be observed that here, in addition to leaving the matter of words to the jury, Kriewaldt J. was prepared to treat a single tribe as a separate community. There are marked differences between the various aboriginal tribes.

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[11] Unreported, February 2, 1956.

[12] (1954) 38 Cr.App.R. 133 (H.L.).

[13] Kriewaldt J. did not refer to *Bedder* v. *D. P. P.* by name. The relevant passage in the summing-up is as follows: "My second example some of you may consider a little bit rude. It concerns a young man who was sexually impotent, or so he suspected. Driven by his suspicions one night he sought out a harlot. When he was unable to take advantage of her proffered favours, she mocked at his impotence. The young man lost his temper and killed her. The court decided that her actions were not sufficient to amount to provocation and hence the crime was not reduced to manslaughter. The average person would not have reacted with violence and therefore the harlot's gibe was not provocation."

[14] To which both the defendant and the deceased belonged.

Shortly afterwards *Nelson*[15] was decided. In this case Kriewaldt J. applied his views to the particular question of time for passion to cool. The situation was in principle the same as in *Macdonald*, the deceased having attacked and injured the defendant, who then went off and fetched two boomerangs with which he subsequently killed the deceased. At the time of the killing the defendant was under the impression that the deceased had caused some harm to his wife. On the question of the time which had elapsed between the injury and the killing,[16] his Honour directed the jury as follows: "If the accused in this case were a white person I should have to tell you as a matter of law that the defence of provocation would not be open because on Nelson's story a sufficient time had elapsed between the time he was wounded and the time he struck Dann[17] for passions to have died down. But the accused is not a white man . . . if you think that the ordinary average native would have cooled down by the time Nelson hit Dann on the head with the boomerang, then the defence of provocation is not open. But if you believe the average native of the northern parts of this Territory would still have been smarting from the effects of that wound and would have been likely to retaliate, then that defence is open. To that extent the law may be regarded as more favourable to natives than white people. Although I must lay down the law exactly the same for white people as for natives, the application of the rules of law by you may well be different.

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[15] Unreported, March 21, 1956.

[16] The precise period is not clear. The defendant needed to recover from a blow on the head with a crowbar and to fetch his weapons from nearby. Ten minutes or quarter of an hour seems likely.

[17] The deceased, who appears to have been a white man.

We all know that a white person cools down comparatively quickly. . . . In the case of a native you may think it right to say that the effect of provocation lasts longer than in the case of a white person." A verdict of manslaughter was returned.

Unless and until altered by a higher court, the law of provocation in the Northern Territory is as indicated in these extracts. It is submitted that this law provides adequately and justly for the situation where the defendant is an aborigine living in his native community, and that it is immaterial from what race or community the deceased person comes. But, as Mr. Marsack has pointed out with reference to Jamaicans in England and Samoans in New Zealand, there are other possibilities. In the Northern Territory of Australia the situation is as yet fairly simple. The white settlers do not significantly outnumber the indigenous natives. On the whole the two communities live apart in their different ways and have plenty of room to do so. It is not difficult to distinguish between the different influences at work on members of the two racial groups in a problem of this kind. It is therefore just and reasonable to adopt the solution propounded by Kriewaldt J. The case is very different where members of one community voluntarily join another, perhaps altogether strange in background and customs, for some economic advantage.[18] In this situation it is reasonable that the newcomers should take their adopted country as they find it, even if, as often happens, they tend to preserve their own customs and language in a separate sub-community. The law would become over-complicated if a Jamaican who killed another Jamaican in London were entitled to an inquiry by the jury whether at the time of the killing he was more under the influence of Jamaican than of English customs. In the absence of special legislation, the same rule would apply to Englishmen employed in such countries as India, Pakistan, and Ghana.

Finally, Mr. Marsack puts the problem of the New Zealander in Samoa on a tour of duty only, and asks if he is to be credited, or debited, with the characteristics of an average Samoan. One may confidently assert that he is not, but some basis must be found for the assertion. It is submitted that the answer depends on whether as a matter of fact there are two[19] distinct and separate communities in the particular area. It should be open for the defendant to argue, and adduce evidence or invite judicial notice in support of his argument, that a relaxation should be allowed on this ground. If the defendant did not follow this course in a proper case, it would be the duty of the judge to take judicial notice of the existence of separate communities and direct the jury accordingly. In the case of colonial officers serving a tour of duty in a country to which the common law applied, the question could hardly arise, for the only point of proving separate communities would be to ask for a *relaxation* of the prima facie rule. Thus, the New Zealand officer in Samoa would not be affected, for he would be subject to the more stringent rule in any event.

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[18] Puerto Ricans in the U.S.A.; Jamaicans and Pakistanis in England; many migrants to Australia.

[19] Or more: consider the multi-racial communities in such places as Singapore and Fiji.

Practice and Procedure

Mental Health Act, 1959

The Act came into operation on November 1, 1960. Subject to transitional provisions, the Lunacy and Mental Treatment Acts, 1890–1930, and Mental Deficiency Acts, 1913–38, have ceased to have effect.

Mental disorders are defined and classified in section 4.

The powers of the courts to make orders are:—

I. Courts of assize and quarter sessions

(1) *Hospital Order—Guardianship Order*—Section 60. On conviction of a person of an offence the sentence for which is not fixed by law, the court, if satisfied on the written or oral evidence of two medical practitioners (complying with section 62 and each stating that the offender is suffering from the same form of mental disorder) that the offender is suffering from mental illness, psycopathic disorder, subnormality or severe subnormality, and that the mental disorder is of a nature or degree which warrants detention in a hospital for medical treatment or reception into guardianship, and that arrangements have been made for admission of the offender to hospital within twenty-eight days, or that the local authority or person is willing to receive him into guardianship, and is of opinion having regard to all the circumstances, including the nature of the offence, the character and antecedents of the offender and other available methods of dealing with him that the most

suitable method of disposing of the case is by such order, may by order specifying the form of mental disorder from which the offender is suffering authorise his admission to and detention in a hospital specified in the order, or place him under guardianship of a local health authority or some other approved and specified person.

Note: (a) Such an order may not be accompanied by any order of imprisonment (including any form of detention or approved school order), fine or probation order in respect of the offence.

(b) For order by quarter sessions on committal from a magistrates' court, see below II (2).

(2) *Order Restricting Discharge*—Section 65. The court making such hospital order may, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if at large if it considers it necessary for the protection of the public, provided at least one of the medical practitioners has given oral evidence, order that the offender shall be subject to the special restrictions set out in the section during a specified time or without limit of time.

II. Magistrates' courts

(1) *Hospital Order—Guardianship Order*—Section 60. On conviction of a person of an offence punishable on summary conviction with imprisonment the court, if the conditions set out above in I (1) are satisfied, may make a hospital order or guardianship order as set out in I (1).

Note: In the case of a person suffering from mental illness or severe abnormality such order may be made without recording a conviction if the court is satisfied that the accused did the act or made the omission charged.

(2) *Committal for Order Restricting Discharge*—Section 67. If satisfied that the conditions necessary for a hospital order are satisfied (except arrangements for admission) and having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large and of opinion that, if a hospital order is made, an order restricting discharge should also be made, the court may commit the offender in custody to quarter sessions to be dealt with.

Note: (a) Such committal may be combined with a committal under section 29, Magistrates' Courts Act, 1952.

(b) If arrangements have been made for admission of the offender to hospital in the event of an order being made, the court may direct his admission to hospital instead of committing him in custody.

(c) Quarter sessions shall inquire into the circumstances of the case and make a detention order, with or without restriction on discharge, if the conditions set out in I (1) and (2) are satisfied or may deal with the offender in any manner in which the magistrates' court might have dealt with him.

(d) Quarter sessions may make a hospital order, with or without restrictions on discharge, where a person has been committed under the Vagrancy Act, 1824, s. 5.

III. Juvenile courts

Additional Powers—Section 61. In the case of a child or young person brought before the court under sections 62 or 64, Children and Young Persons Act, 1933, the court may—

if satisfied that the child or young person is in need of care or protection or that his parent or guardian is unable to control him, and that the conditions set out in I (1) above are satisfied, and that in the case of section 64 the parent or guardian understands the effects of the order and consents to it, make a hospital or guardianship order.

Note: Such an order may be made in conjunction with an order committing the child or young person to the care of a fit person but not in conjunction with any other orders under sections 62 or 64, Children and Young Persons Act, 1933.

IV. Appeal

Sections 69 and 70. An appeal lies to the Court of Criminal Appeal against a hospital order, guardianship order or order restricting discharge made by a court of assize or quarter sessions, and against an order restricting discharge made by a court of quarter sessions on committal under section 29, Magistrates' Courts Act, 1952; section 5, Vagrancy Act, 1824 or section 67, Mental Health Act, 1959.

An appeal lies to quarter sessions against a hospital order or guardianship order made by any court of summary jurisdiction, whether on conviction or without recording a conviction, or on a finding of guilt.

V. Conveyance of patients to hospital

Sections 63 and 64. The court making a hospital order may give directions as it thinks fit for the conveyance of the patient to a place of safety (defined in s. 80) and his detention there pending admission to hospital.

A hospital order authorises a constable, mental welfare officer or other person so directed by the court to convey the patient to the hospital specified within twenty-eight days.

VI. Medical practitioners and their reports

Section 62. At least one of the medical practitioners reporting must be approved by a local health authority for the purposes of section 28 of the Act as having special experience in the diagnosis or treatment of mental disorders.

A report in writing purporting to be signed by a medical practitioner may be received in evidence without proof of signature or qualifications. The court, or the accused, may require the medical practitioner to give oral evidence and the accused may call evidence in rebuttal.

When a report in writing is tendered in evidence otherwise than by the accused, a copy must be given to his counsel or solicitor, or, if he is not represented, the substance of the report must be disclosed to him (to the parent or guardian of a child or young person, if present in court).

VII. Probation orders

Section 4, Criminal Justice Act, 1948. Where the court is satisfied on the evidence of a duly qualified medical practitioner approved for the purposes of section 28, Mental Health Act, 1959, that the mental condition of an offender is such as requires and may be susceptible to treatment, but is not such as to warrant his detention in pursuance of a hospital order, if it makes a probation order it may include therein a requirement that the offender shall submit, for such period not extending beyond twelve months from the date of the order, as may be specified therein to treatment as a resident patient in a hospital or mental nursing home, within the meaning of the Mental Health Act, 1959, not being a special hospital within the meaning of the Act, or as a non-resident patient at such institution or place as may be specified in the order, or by or under the direction of such duly qualified medical practitioner as may be specified in the order.

[C. B. ORR.]

Case and Comment [*]

EVIDENCE

Burden of proof—summing up to jury—whether "pretty certain" sufficient for standard of proof

R. v. Law

Court of Criminal Appeal: Lord Parker C.J., Paull and Elwes JJ.: October 31, 1960: *The Times*, November 1, 1960.[1]

L. was convicted at quarter sessions of obtaining money by false pretences. The case for the prosecution was that L. had gone to the offices of a bookmaker and had written out a betting slip for three trebles on some dog races; and that after the result of the races were known he, or someone on his behalf, had broken into the offices and had substituted a new slip. The bookmaker's clerk identified L. as the man who had placed the bet and as the man who had called on one occasion for payment. On the question of the burden of proof the jury were directed in the summing-up that they had to be satisfied of the guilt of the prisoner and that "being satisfied means that you have that feeling of certainty that you would like to have in your own affairs. . . . If you were going to do something in your own affairs you would make pretty certain of the true state of affairs." Later in the summing-up was a further passage: "You must be satisfied and, as I warned you, you must be pretty certain that these slips were changed because, if they were not, the whole structure of the case falls to the ground." On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that this was a new direction on the burden of proof, new at any rate to the members of this court. It was not the customary direction: "You must be satisfied beyond reasonable doubt," or "You must be satisfied so that you feel sure," but imported a dangerous qualification that a matter should be "pretty certain." The danger of importing such an expression was that the jury might feel that it was not necessary for them to be sure of the prisoner's guilt but it was enough if they felt "pretty certain." There might well have been evidence, albeit thin evidence, to go to the jury in this case and upon which the jury could have convicted, provided that there had been a clear and proper direction on the onus and standard of proof, but having regard to the unfortunate expression "pretty certain," this court felt that it would be dangerous to let the conviction stand. Accordingly, the conviction would be quashed. [H. P.]

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[*] Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: *C. McCullough* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *E. F. Jowitt* (instructed by the Town Clerk, Peterborough).

Commentary. ". . . it is almost a commonplace that a sensible and experienced citizen, in the course of reaching a decision whether a certain thing has or has not happened, will allow his judgment to be influenced by evidence which would not be accepted in the courts. Indeed, I have no doubt that judges of the highest eminence reach conclusions in their own private and domestic affairs by reference to a standard more relaxed than that which the courts allow": *per* Viscount Birkenhead in *Rutherford* v. *Richardson* [1923] A.C. 1. Apart from the dangers thought by the court to arise from the use of the phrase "pretty certain," it would seem that the jury were invited in the present case to decide according to that more relaxed standard which Viscount Birkenhead would not allow.

No special form of words is required in explaining to a jury the standard of proof which must be satisfied by the prosecution in a criminal case; but, clearly, there are grave risks in departing from such well-tried formulae as "beyond reasonable doubt," etc.

Identification—evidence of similar incidents allowed

R. v. Giovannone

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Elwes JJ.: October 25, 1960.[2]

The appellant was convicted at quarter sessions of obtaining a motor-car by false pretences. The offence was committed when a man named C. went to one S. who had a car for sale. Negotiations took place, and an inspection of the car was carried out by a person purporting to be a fitter. There was then a conversation as to the merits of the car and, eventually, C. expressed himself satisfied with the condition of the car, handed over a cheque for the price and drove away. The cheque was dishonoured. At the trial S. identified the appellant as the fitter, but the appellant denied that he was the man concerned. The prosecution, the court having so ruled, introduced evidence of witnesses who had been subjected to three similar incidents and who identified the appellant as the fitter concerned. On appeal to the Court of Criminal Appeal:

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[2] For the appellant: *R. H. Tuck* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *R. M. Talbot* (instructed by Arthur S. Clark & Son, Reading).

Held, dismissing the appeal, that evidence relating to similar incidents was not admissible for the purpose of showing a tendency or a predisposition to commit the offence charged; but such evidence was admissible to prove identity, as was recognised in *R.* v. *Robinson*, 37 Cr.App.R. 108 and *R.* v. *Harris*, 36 Cr.App.R. 53. In the present case identity was a matter very much in issue. The similarities and course of conduct on the three other occasions were marked; there had been the same conversation, the same inspection and the same discussion with the fitter. The identification on those occasions was positive and, indeed, not in issue. That evidence had been rightly admitted for the purpose of showing that the evidence of identification by S. was right. Accordingly, the appeal failed. [H. P.]

Commentary. It appears that there was present in this case that striking similarity in the facts which the law requires as a condition of the admissibility of evidence of other incidents. *Cf. R.* v. *Coombes* (below).

It does not appear whether there was any independent evidence that the fitter was an accomplice of S.: *i.e.*, that he knew that there were false representations implicit in the giving of the cheque (*Cf. R.* v. *Hazelton* (1874) 2 C.C.R. 134) and intended to defraud. No doubt the proof that he had participated in other similar frauds would also be cogent evidence that he had *mens rea*.

Sexual offence—touch on the back—whether evidence of previous conviction for indecent assault should be allowed

R. v. Coombes

Court of Criminal Appeal: Lord Parker C.J., Slade and Elwes JJ.: November 14, 1960: *The Times*, November 15, 1960.[3]

C. was convicted at quarter sessions of indecent assault on a married woman. According to the evidence of the complainant, C. was pushing a handcart in the street, he left it and followed her for some distance; he caught up with her, asked her the time, touched her lightly on the back and said: " Are you going to give me a bit? " C.'s defence was that he touched the woman by accident and said to her: " I'm sorry, I didn't mean it a bit." During the trial the court ruled that C. could be cross-examined about a previous conviction of indecent assault on a girl of twelve;

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[3] For the appellant: *J. R. Main* (instructed by Roach Piths, Newport, Isle of Wight). For the Crown: *Raymond Stock* (instructed by Bland Bailey and Band, Newport, Isle of Wight).

and when cross-examined, C. admitted that he had pleaded guilty to that offence. On appeal to the Court of Criminal Appeal:—

Held, allowing the appeal, that it was perfectly clear that evidence of a previous offence was admissible to rebut a defence of accident and also to rebut a defence of innocent intent. The previous offence must have been of a similar character, although there was no clear authority on the question of the degree of similarity. There had to be some *nexus* both in time and in the nature of the offence. However, it was unnecessary in this case to decide whether the previous offence was sufficiently similar to the offence charged so as to make it admissible; it was unnecessary because the evidence was so highly prejudicial as far to exceed its probative value. Whether such evidence should be admitted was, of course, a matter of discretion for the trial judge. But in the present case the chairman had ruled upon the matter without having heard evidence from the investigating officer as to the details of the previous offence. This court would not lightly interfere with the discretion of the trial judge but it was in the circumstances of this case, possible to interfere and to hold that the evidence ought not to have been admitted. It would be unsafe to allow this conviction to stand and, accordingly, the appeal would be allowed. [H. P.]

Commentary. It was apparently assumed in this case that the light touch on the back was an indecent assault. It was certainly an assault, if done deliberately, but whether it was indecent is not so clear. In *R.* v. *George* [1956] Crim.L.R. 52, Streatfeild J. held that an attempt to remove a girl's shoe was not an indecent assault, even though this was done in order to gratify a perverted sexual desire. An assault became indecent only if it was accompanied by circumstances of indecency towards the person assaulted and it was not enough that there was an indecent motive in the mind of the defendant. The present case is possibly distinguishable on the ground that the words used were a circumstance of indecency: but in *R.* v. *Abrahams* [1918] 3 S.A.L.R. 519 it was apparently held that it was no indecent assault where the accused caught hold of a girl by the arm and used a filthy expression, and a similar decision was reached in *R.* v. *Chong* (1915) 32 O.L.R. 66. See Kenny, *Outlines of Criminal Law* (17th edn.) 183.

The degree of similarity which the other incidents must have to the act charged in order to be admissible evidence is obviously a matter on which no precise rules can be laid down. In *R.* v. *Starkie* [1922] 2 K.B. 275 the Court of Criminal Appeal held that "evidence that the appellant administered drugs to one woman with intent to procure her abortion was admissible in support of a charge of having used an instrument with this intent upon another and vice versa, the point being not to prove thereby that he used the instrument or administered the drug, but to rebut the contention of the defence that he did so innocently." In order to be relevant, facts must be similar in respects significant for the purposes of the inquiry in hand. The issue in that case being simply the accused's intent, the significant fact was that he had previously procured abortions, not that the same means had been used on the other occasions. If the question had been one of identity, then the similarity of the means used might have been the significant thing. *Cf. R.* v. *Straffen* [1952] 2 Q.B. 911 where on a question of identity, Cassels J. pointed out five similarities in the circumstances of a group of murders.

It is "the duty of the judge, when trying a charge of crime, to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused": *Harris* v. *D. P. P.* [1952] A.C. 694, 707. In all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case, have only trifling weight, the judge will be right to exclude it": *Noor Mohammed* v. *R.* [1949] A.C. 182, 192.

SENTENCE

Preventive detention—whether probation order is a qualifying conviction for the purposes of the Criminal Justice Act, 1948, s. 23

R. v. Durante

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Elwes JJ.: October 10, 1960.[4]

D. pleaded guilty at quarter sessions to office-breaking and larceny and was sentenced to seven years' preventive detention. He was a man of thirty-four years of age with twelve previous convictions. One of the convictions set out in the notice under section 23 of the Criminal Justice Act, 1948, was a conviction for shop-breaking and larceny in respect of which he had been sentenced to borstal training; but that rentence had been altered on appeal to the Court of Criminal Appeal to a binding over in the sum of £50, subject to the condition that D. should reside with his brother and be under the probation officer. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that the sentence of preventive detention was fully merited and the only question on the appeal was whether the conviction [referred to above] was a qualifying conviction for the purposes of section 23 of the Act of 1948. If the order made was a probation order it would not, on the authority of *R.* v. *Stobbart* (1951) 35 Cr.App.R. 125, be a qualifying conviction, whereas if it was a binding over, it would. This court had looked at the Criminal Appeal register and had found that the order made was a binding over and not a probation order. Accordingly, the appeal would be dismissed. [H. P.]

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[4] The appellant appeared in person. The Crown was not represented.

Commentary. Section 12 (1) of the Criminal Justice Act, 1948, provides "subject as hereinafter provided, a conviction of an offence for which an order is made under this Part of the Act placing the offender on probation or discharging him absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act."

The provisions relating to corrective training and preventive detention are not contained in the foregoing provisions of the Act, but in subsequent provisions (section 21). It is thus clear, as was held in *Stobbart*, that a probation order is not a conviction for the purposes of the imposition of a sentence of corrective training or preventive detention.

Stobbart was distinguished in *R.* v. *Abrahams* (1952) 36 Cr.App.R. 147 where the Court of Criminal Appeal held that, since the Act makes no provision with respect to binding over similar to that made for probation, a conviction followed by a binding-over is a qualifying conviction within section 21 of the Act; though the sentence of preventive detention, in that case, was varied to one of imprisonment on other grounds.

Whether sentence of imprisonment should be imposed consecutive to sentence of preventive detention

R. v. Nurse

Court of Criminal Appeal: Lord Parker C.J., Slade and Elwes JJ.: November 14, 1960.[5]

N. pleaded guilty at assizes to wounding with intent and was sentenced to two years' imprisonment, the sentence to begin at the conclusion of a sentence of preventive detention then being served by him. N., who was a man of thirty-eight years of age, had thirteen previous convictions, the last conviction being in 1954 when he received seven years' preventive detention for eight cases of house-breaking. The present offence was committed when (after being allowed to go out to work) he became involved in a public-house brawl and attacked another man with a glass. On appeal to the Court of Criminal Appeal:

Held, that leave to appeal had been given in this case so that the court should consider the question of the propriety of imposing a sentence of imprisonment consecutive to a sentence of preventive detention. This court had said in *R.* v. *Talbot* (1953) 37 Cr.App.R. 23, and *R.* v. *Hedgecock* (1957) 41 Cr.App.R. 136, that a sentence of imprisonment following corrective training was inappropriate. Inquiries had been made as to the position in the case of imprisonment following preventive detention and the court understood that such a sentence would raise no administrative difficulties. The sentence imposed was fully deserved and, accordingly, the appeal would be dismissed. [H. P.]

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[5] For the appellant: *M. Fallon* (instructed by the Registrar, Court of Criminal Appeal).

TRIAL

Alternate counts of larceny and receiving—conviction of breaking and entering and larceny—evidence equally consistent with receiving

R. v. Young and Irving

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Elwes JJ.: November 8, 1960: *The Times*, November 9, 1960.[6]

The appellants had been convicted at assizes of breaking and entering and stealing. There were alternative counts of receiving. They appealed to the Court of Criminal Appeal on the main ground that all the evidence was just as consistent with receiving as it was with stealing and, therefore, the appellants should have been found guilty of receiving. It was also contended that in summing-up to the jury the learned judge ought to have pointed out the particular matters which would have helped the jury to decide which verdict to return.

Held, dismissing the appeals, that in the great majority of cases where there were alternative charges of larceny and receiving, it became clear during the trial that it was a case of larceny and nothing else (in which case the judge would withdraw the charge of receiving) or that it was a case of receiving and nothing else (in which case the judge would withdraw the charge of larceny). For example, where a man was found in possession of stolen goods within minutes of the theft and running from the scene of the crime, there would be no room for a verdict of receiving. On the other hand the property might be found in a man's possession weeks after the theft when, unless there was evidence of a particular association with the thieves or some peculiar character in the property, the judge would withdraw the charge of larceny. In between, there were many cases where either verdict might be possible. This was such a case. It was, therefore, for the jury on a proper direction to decide whether each of the appellants was guilty of breaking and entering and stealing or, on the other hand, of receiving. The judge went through the evidence with meticulous care. To have pointed out to the jury whether each piece of evidence would have fitted in better with one offence rather than the other would not only confuse the jury but would lead to endless argument in this court. The course adopted by the learned judge was correct. In those circumstances, the appeals would be dismissed. [H. P.]

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[6] For the appellant Young: *Malcolm Morris, Q.C., J. Averill* (instructed by W. H. Hopkins). For the appellant Irving: *J. Averill* (instructed by W. H. Hopkins). For the Crown: *Gerald Howard, Q.C., Edward Gardner, Q.C.* (instructed by the Director of Public Prosecutions).

Commentary. See *R.* v. *Loughlin* (1951) 35 Cr.App.R. 69; *R.* v. *Christ* (1951) 35 Cr.App.R. 76; *R.* v. *Seymour* (1954) 38 Cr.App.R. 68 and *R.* v. *Roma* [1956] Crim.L.R. 46.

VERDICT

Verdict of guilty with plea for leniency not accepted—new verdict of guilty on all counts

R. v. White

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Elwes JJ.: November 8, 1960.[7]

W., together with one S., was convicted at quarter sessions of receiving stolen property. After the jury had returned verdicts of guilty the foreman said that the jury wished to put in a plea for leniency. When asked if there was any reason for such a plea, the jury said that when W. and S. started selling the stolen property " they may have been doing it quite innocently, but as time went on it may have dawned on them: we put it down to simple-mindedness." The recorder then refused to accept the verdicts and explained the law to the jury again. They were then asked again for their verdicts and they returned a verdict of guilty on all counts. On application for leave to appeal to the Court of Criminal Appeal:

Held, refusing the application, that the recorder had acted quite properly in refusing to accept the first verdicts. By explaining the law to the jury again and taking fresh verdicts the recorder was acting entirely within his rights and, in the end, there was no ambiguity. Accordingly, the application would be refused. [H. P.]

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[7] The applicant did not appear and was not represented.

Commentary. If a jury finds a verdict which it is impossible for them properly to find on the evidence, the judge may direct them to reconsider it and, if they do so and find a different verdict which the judge records, the latter is the true verdict: *R.* v. *Meany* (1862) 9 Cox C.C. 231. In the case of the Hammersmith ghost the jury returned a verdict of guilty of manslaughter. The judges then told them that they were at liberty to acquit the prisoner or to find him guilty of murder but that a verdict of manslaughter was not possible on the evidence. A verdict of murder was then returned and received: *per* Pollock C.B. in *Meany* (above). If the verdict is ambiguous, again it is clear that the jury may properly be asked to reconsider it. If the verdict is so phrased that it shows the jury have misunderstood the direction on the law, but that they have found facts on which the prisoner would be not guilty, they may still be asked to reconsider and a second verdict of guilty will be in order: *R.* v. *Crisp* (1912) 7 Cr.App.R. 173. In that case the court found that there was no real ambiguity in the jury's verdict, that they must have intended to answer the question of fact in favour of the accused and that they "might possibly have insisted on its being taken as a verdict of not guilty"; but, as they did not do so, their reconsidered verdict, after the evidence had been brought more fully to their attention, was the right one.

The present decision seems to be on all fours with *Crisp*; and in both cases it is difficult to feel that the jury were really satisfied beyond reasonable doubt of the facts necessary to support a conviction. Each jury failed in the first instance to understand the direction on the law, but made a clear statement of their view of the facts; and in both cases that view required an acquittal. It is difficult to see why an explanation of the law should alter the jury's view of the facts and the cases give the impression of juries not really knowing what they are about and being overborne by the judge's view of the facts.

If the recorder had not asked the jury why they wished to put in a plea for leniency it is clear that the accused would have been convicted by a jury which really thought he was innocent. See also *R.* v. *Adair* (1958) 42 Cr.App.R. 227 where a conviction which was based on a quite inadmissible view of the facts was only impeachable because of the accident that the jury had asked a question which showed the view they were taking. It is impossible to know how often verdicts (whether of conviction or acquittal) are returned upon grounds which are wrong in law, for the juries give no reasons for their decision and, where their verdict is plain and unambiguous, the judge should ask no questions about it: *R.* v. *Larkin* (1942) 29 Cr.App.R. 18. Cases such as *Adair* and the present (see also *R.* v. *Mulvey* [1958] Crim.L.R. 334 and *R.* v. *Dawson* [1960] Crim.L.R. 358, 361) do not increase one's confidence in jury trial. Surely the time has come when some research should be done into what really does happen in the jury room? Cf. Glanville Williams, *The Proof of Guilt* (2nd ed.), 272 *et seq.*

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Burglary

In R. *v.* BRANNAN the court (Lord Parker C.J., Slade and Elwes JJ.: November 14, 1960) varied a sentence of eight years' preventive detention to one of five years' imprisonment. B. had pleaded guilty at quarter sessions to burglary and larceny, workshop-breaking and larceny and simple larceny, and six other offences were taken into consideration. B., who was a man of forty-seven years of age, had nine previous convictions for serious crime. His last conviction was in 1950 when he was sentenced to eight years' preventive detention for two offences of burglary, forty-two other offences being taken into consideration. The court stated that this was a disheartening case because whatever sentence was imposed B. was probably going to spend the rest of his life in prison. However, since his last release from prison, B. had obtained employment and worked steadily and well for some three-and-a-half years. He obtained a testimonial to the effect that he was efficient, conscientious and an excellent time-keeper. On the whole this court felt that, having regard to those years of work, it would be proper to substitute a sentence of five years' imprisonment for the sentence of preventive detention.

Housebreaking

In R. *v.* HARVEY the court (Lord Parker C.J., Paull and Elwes JJ.: October 31, 1960) varied a sentence of three years' imprisonment to probation for three years. H. had pleaded guilty at quarter sessions to housebreaking and larceny. H., who was a man of twenty-five years of age, had seven previous convictions and had been to approved school, borstal training and served one term of imprisonment for shopbreaking and burglary. The court stated that housebreaking offences were always serious and in this case the offence was not made any better by the fact that it was committed at a house where H. had been doing some decorating. However, it was only right to say that H. was clear of any trouble from May 1956, when he was last released from prison, until June

1960. He apparently set up as a builder and decorator on his own account, but by 1960 he was getting into financial trouble. At the time of the offence he said, and this court accepted it, that he was out of work, in debt, his wife and family were short of food, and that he acted impulsively and in a moment of desperation. From the information now before this court it appeared that H. had made a real effort to pull himself together and that he was really making good after his bad start. In those circumstances this court felt, especially as H. had now been in prison for the equivalent of a six months' sentence, that they could give this man one more chance. Accordingly, the sentence would be varied to one of probation for three years.

In R. *v.* KEEGAN the court (Lord Parker C.J., Slade and Elwes JJ.: November 14, 1960) varied a sentence of borstal training to such sentence as would permit immediate discharge. K. had pleaded guilty at a Crown court, with others, to two housebreaking offences and six other offences were taken into consideration. K., who was a young man of eighteen years of age, was previously of good character. The court stated they did not agree with the suggestion that the appellant should have been put on probation. K. had committed eight offences of housebreaking and had been concerned with a number of other youths and, in those circumstances, it was not a case for probation. K. had to be punished. The prison commissioners had not recommended him for borstal training and, therefore, it seemed to this court that the sentence should have been a sentence of imprisonment assuming there was no vacancy available in a detention centre. K. had now been in custody for eight months which, on any view, was as long as he would have been detained if sent to prison, if not longer. Accordingly, the sentence of borstal training would be set aside and such sentence of imprisonment substituted as would enable K. to be discharged tomorrow.

Officebreaking

In R. *v.* MELIA the court (Lord Parker C.J., Paull and Elwes JJ.: October 31, 1960) varied a sentence of eight years' preventive detention to one of five years' imprisonment. M. had pleaded guilty at a Crown court to officebreaking and larceny and to four other offences of breaking and for larceny; fifty-eight other offences were taken into consideration. M., who was a man of thirty-six years of age, had nine previous convictions including: nine months' imprisonment for officebreaking and larceny in 1946, twelve months' for receiving in 1948, twelve months' for larceny in 1949, four years' corrective training for housebreaking and larceny in 1950 and three years' imprisonment for four further offences of housebreaking and larceny in 1953. The first of the present offences was committed when M. broke into an office and stole £25; he was released on bail in respect of that offence, failed to surrender and committed the further offences, which included the larceny and use of a cheque book. The court stated that M. was a man who, quite clearly, unless he pulled himself together, was going to end up in preventive detention. The only question was whether he was ready for it, as it were, now. Having regard to (i) the prison commissioners' report that M. was fully competent to lead a law-abiding life if he chose to do so and (ii) the fact that for four years after his last release from prison he obtained employment and kept out of trouble, this court felt that they could give him one further chance. Accordingly, a sentence of five years' imprisonment would be substituted for the sentence of eight years' preventive detention.

Receiving

In R. *v*. Connor the court (Lord Parker C.J., Slade and Elwes JJ.: November 14, 1960) varied a sentence of borstal training to one of imprisonment for twelve months. C. was convicted at quarter sessions of receiving stolen property. C., who was a young woman of twenty years of age, had four previous convictions, having been three times placed on probation and, finally, sentenced to three months' imprisonment in April 1960 for larceny. The prison commissioners had reported that C. was too mature to benefit from borstal training. The court stated that the only doubt was whether, in the circumstances, the appellant should go to borstal training. The court felt that, where the prison commissioners recommended that a person was too mature to benefit from such training, it was quite wrong to fill such vacancies as there were by sending that person to borstal. The appropriate sentence was one of twelve months' imprisonment.

Acts and Orders *

Isles of Scilly

Article 22 of the Isles of Scilly (Sale of Intoxicating Liquor) Order, 1951 (S.I. 1951, No. 808), which modifies and adapts certain enactments in their application to the Isles of Scilly, is amended by extending to the Isles of Scilly in a modified form that part of the Betting and Gaming Act, 1960, which permits dominoes and cribbage to be played for money stakes on licensed premises. Operative January 1, 1961. ISLES OF SCILLY (SALE OF INTOXICATING LIQUOR) ORDER, 1960 (S.I. No. 1969) (2d.).

London Traffic

The following Orders have been made prohibiting parking: S.I. Nos. 1824 (Amersham) (3d.); 1855 (Slough) (3d.); 1913 (Dartford) (3d.).

The following Orders have been made prohibiting cycling on footpaths: S.I. Nos. 1823 (Slough) (2d.); 1842 (Hornchurch) (3d).

The following Orders have been made detailing prescribed routes: S.I. Nos. 1854 (Holborn) (3d.); 1897 (Ilford) (3d.); 1976 (Guildford) (2d.); 1977 (Southwark) (2d.).

The London Traffic (Parking Places) Consolidation Regulations, 1957 (S.I. No. 1957/1937) are further amended. The principal changes are (1) the appointment of certain parking places in Westminster, Lewisham, St. Pancras, Barnes, Bromley, Finchley, Ilford and Slough is revoked; (2) the limits of certain parking places in Hampstead, Shoreditch, Woolwich and Dartford are altered; (3) the permitted time during which vehicles may wait in certain parking places in Northfleet and Gravesend is extended and the maximum period of waiting there is increased, and (4) new parking places are appointed in West Ham, Ealing and Harrow. Operative November 9, 1960. LONDON TRAFFIC (PARKING PLACES) CONSOLIDATION (AMENDMENT) (NO. 2) REGULATIONS, 1960 (S.I. No. 1979) (3d.).

Previous Orders relating to parking places in Westminster at which charges may be made by the City Council are further amended. The principal changes are (1) traffic wardens employed by the Commissioner of Police of the Metropolis are authorised to perform certain functions hitherto performed by parking attendants;

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* Prepared by F. Maurice Drake, *Barrister-at-Law.*

(2) the Commissioner of Police of the Metropolis is given some of the powers hitherto exercised by the City Council; and (3) new provision is made prohibiting any person from inserting coins in a parking meter in respect of a vehicle at a parking bay additional to those inserted in the meter as payment for the initial charge for that vehicle. Operative November 1, 1960. PARKING PLACES (WESTMINSTER) (NO. 1, 1958) (AMENDMENT NO. 2) (NO. 1, 1959) (AMENDMENT) ORDERS, 1960 (S.I. Nos. 1943 and 1944) (each 3d.).

For penalties for contravention, see section 22 of the Road Traffic Act, 1956.

Magistrates' Courts

The following Order has been made in respect of petty sessional divisions: S.I. No. 1968 (Somerset) (3d.).

Mental Health

These are the principal regulations dealing with the exercise of compulsory powers in respect of persons liable to be detained in hospitals or subject to guardianship under the Mental Health Act, 1959. Part III sets out the powers and duties of guardians and responsible local health authorities in respect of persons subject to guardianship. The responsible local health authority must arrange visits at intervals of not more than three months (Reg. 7). All guardians are required to make appropriate provision for the patient's health and welfare (Reg. 6). A guardian other than a local health authority is required to exercise his functions subject to any directions of the responsible local health authority and to give the authority certain information in respect of the patient (Reg. 10). Part IV provides the procedure by which patients may be transferred under section 41 of the Act from one hospital to another, from hospital to guardianship or vice versa and from one guardian to another. It also provides for the conveyance of patients (Regs. 17 and 18). Regulation 24 enables certain functions of local health authorities and hospital authorities to be performed by officers, and Regulation 25 enables a nearest relative of a patient to delegate his functions under the Act to another person. Regulation 23 enables any patient to write to his solicitor without his letters being opened. Part VI deals with miscellaneous matters including the service of documents (Reg. 20) and their proof (Reg. 22). The various forms to be used for the admission of patients to hospital or their reception into guardianship under Part IV of the Act, and for certain other reports required under the Act in connection with detention or guardianship are prescribed (Reg. 4

and the Schedule). The Mental Health (Approval of Medical Practitioners) Regulations, 1960 (S.I. 1960, No. 771) are revoked and the provisions thereof re-enacted under Regulation 5. Operative November 1, 1960. MENTAL HEALTH (HOSPITAL AND GUARDIANSHIP) REGULATIONS, 1960 (S.I. No. 1241) (1s. 3d.).

Nuisance

NOISE ABATEMENT ACT, 1960 (8 & 9 Eliz. 2, c. 68). Operative August 29, 1960. This Act makes new provisions in respect of the control of noise and vibration, with a view to their abatement. Subject to the provisions of the section, section 1 enacts that noise or vibration which is a nuisance shall be a statutory nuisance for the purposes of Part III of the Public Health Act, 1936. Under section 99 of the 1936 Act a complaint of the existence of a statutory nuisance may be made by any person aggrieved by the nuisance, but under this Act this provision is modified so that complaint may be made by any three or more persons, each of whom is the occupier of land or premises and is in that capacity aggrieved by the nuisance. Section 109 of the 1936 Act (which contains a saving from the operation of Part III of the 1936 Act for mines and industrial processes) does not apply to this Act. In proceedings brought under section 1 of this Act in respect of noise or vibration caused in the course of a trade or business it shall be a defence for the defendant to prove that the best practicable means have been used for preventing and counteracting the effect of the noise or vibration (s. 1 (3)). Section 1 (4) gives certain exemptions from the operation of the Act to statutory undertakers. Section 1 (5) provides for the application of the Act to Scotland by relating it to the Public Health (Scotland) Act, 1897. Provisions against excessive or unnecessary noise contained in the London County Council (General Powers) Act, 1937 (1 & 2 Geo. 6, c. xxxviii), which may be the subject of summary proceedings under the Public Health (London) Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 50), are modified so as to make them correspond with the provisions of section 1 of this Act (s. 1 (6)). The section does not apply to noise or vibration caused by aircraft (s. 1 (7)). Section 2 prohibits the operation of a loudspeaker in a street (a) between 9 p.m. and 8 a.m. for any purpose; (b) at any other time for the purpose of advertising any entertainment, trade or business, and provides that the penalty for contravention shall be a fine not exceeding £10 on summary conviction. Exemptions from these provisions are made for (a) police, fire or ambulance purposes, or by a local authority within their area; (b) for communicating with persons on or directing the movement of a vessel; (c) loudspeakers forming part of a public telephone system; (d) loudspeakers used on vehicles to entertain or for the purpose of talking to the passengers on that vehicle, provided no reasonable cause for annoyance is given to persons in the vicinity; (e) loudspeakers used by transport undertakings to make announcements to passengers or employees; (f) travelling showmen on land used for a pleasure fair; (g) emergencies. Section 2 (3) permits the use of loudspeakers to advertise the sale of perishable commodities for human consumption from a vehicle provided the advertising is by means other than words and is operated so as not to give reasonable cause for annoyance to persons in the vicinity. "Loudspeaker" includes a megaphone or any other device for amplifying sound. Proceedings for an offence under this section in England may, without prejudice to the powers of any other person to take such proceedings, be taken by the local authority. Sections 3 and 4 deal with consequential repeals, etc., of local enactments and savings for by-laws. The Act does not apply to Northern Ireland.

Road Traffic

The principal Order (S.I. 1960, No. 1023) is varied by a provision being added that excise licences for goods vehicles the unladen weight of which exceeds 11 tons and which are authorised to be used on roads by order under section 64 of the Road Traffic Act, 1960, may be taken out for any period of seven consecutive days. Provision is also made prescribing the rate of duty payable in respect of such licences. Operative October 1, 1960. ROAD VEHICLES (PERIOD LICENSING) (VARIATION) ORDER, 1960 (S.I. No. 1640) (3d.).

The Road Vehicles (Part Year Licensing) Order, 1957 (S.I. 1957, No. 703, as amended by S.I. 1957, No. 832), which makes provision as regards the period of less than a year for which an excise licence may be taken out in respect of a mechanically propelled vehicle and as regards the duty payable in respect thereof, is revoked as from October 1, 1960. ROAD VEHICLES (PART YEAR LICENSING) (REVOCATION) ORDER, 1960 (S.I. No. 1639) (2d.).

The principal Regulations (S.I. 1957, No. 702) as amended are further amended by making further provision with respect to the particulars to be furnished and the declaration to be made upon application, for excise licences for mechanically propelled vehicles. Operative October 1, 1960. ROAD VEHICLES (EXCISE) (PRESCRIBED PARTICULARS) (AMENDMENT) (NO. 2) REGULATIONS, 1960 (S.I. No. 1647) (2d.).

The principal Regulations (S.I. 1955, No. 1664), as amended, are further amended. The principal changes are (1) the definition of an invalid carriage in Reg. 3 (1) of the principal Regulations is amended so as to specify 6 cwts. as the maximum unladen weight of such vehicles (Reg. 2 (*a*)); (2) Reg. 4 of the principal Regulations (which relates to the showing of licences on vehicles), Reg. 9 (which provides for the procedure applicable on the transfer of a vehicle) and Reg. 28 (which relates to applications for refunds on the surrender of licences) are amended so as to provide that the provisions of these Regulations shall apply in the case of vehicles kept on public roads as well as to vehicles used thereon (Regs. 2 (*b*), (*d*) and (*f*)); (3) Reg. 8 of the principal Regulations (which provides for the procedure where there is a change of character or use of a vehicle), is amended so as to specify the appropriate amount of duty payable when a new licence for a vehicle is issued by reason of any change in the character or use of the vehicle (Reg. 2 (*c*)); and Reg. 29 (relating to general trade licences) is amended so as to provide that the purposes for which the holder of such a licence may use it shall not include the use of a vehicle for a purpose connected with any social or recreational activity connected with his business as a manufacturer or repairer of a dealer in vehicles (Reg. 2 (*g*)). Operative October 1, 1960. ROAD VEHICLES (REGISTRATION AND LICENSING) (AMENDMENT) REGULATIONS, 1960 (S.I. No. 1648) (3d.).

For penalties for contraventions, see section 25 of the Vehicles (Excise) Act, 1949.

Scotland

A registered medical practitioner attending on or called in to visit a patient and upon becoming aware that the patient is suffering from anthrax is now required forthwith to notify the appropriate Medical Officer of Health. Operative October 1, 1960. PUBLIC HEALTH (INFECTIOUS DISEASES) (SCOTLAND) AMENDMENT REGULATIONS, 1960 (S.I. No. 1689) (2d.).

Theatre and Cinematograph

Regulations make amendments to the Cinematograph Films (Registration of Newsreels) Regulations, 1960 (S.I. 1960, No. 712), rendered necessary as a result of the provision in the Cinematograph Films Act, 1960, under which matters which were previously determined by reference to the length of a film are now to be determined by reference to its playing time. Further Regulations make similar amendments to the Cinematograph Films (Registration) Regulations, 1948 (S.I. 1948, No. 634), and also make further miscellaneous amendments. Both operative October 1, 1960. CINEMATOGRAPH FILMS (REGISTRATION OF NEWSREELS) (REGISTRATION) (AMENDMENT) REGULATIONS, 1960 (S.I. Nos. 1621 and 1669) (each 3d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

74. *Reliant three-wheel motor-car—provisional licence holder unaccompanied*

Considerable argument has arisen in this Division as to whether or not, in the following circumstances, an offence against Regulation 16, Motor Vehicles (Driving Licence) Regulations, 1950, has been committed.

The defendant was seen driving a "Reliant" three-wheel goods motor-van, unladen weight 9 cwt. 62 lb. This van was displaying "L" plates, but the driver, a provisional licence holder, was unaccompanied.

I should mention in passing, although it is my contention that these facts have no bearing on the point in issue, that the vehicle was fitted with one seat only and the reverse gear, whilst still present, had been blanked off. According to the registration book, the vehicle was registered as a motor-car.

The driver was reported, *inter alia*, for being a provisional licence holder and driving when not under supervision and in reply said, "I haven't got a reverse gear, it's blanked off, my mate passed his test for a motor-cycle on one of these with the reverse gear blanked off."

Argument here turns primarily on the fact that the vehicle is three-wheeled and had one seat only, but it is my contention that, despite this, the vehicle is a motor-car by reason of its unladen weight and the driver should, therefore be accompanied.

ANSWER

I agree that the weight of the vehicle in question makes it impossible to regard it as a motor-cycle (see the definition now in section 253 (4) of the Road Traffic Act, 1960). The Motor Vehicles (Driving Licences) Regulations, 1950, allows a learner driver to drive without a qualified driver " in the case of a vehicle (other than a motor-car) etc." It seems clear, therefore, that the facts that the vehicle is three-wheeled, has one seat only and has the reverse gear blanked off are irrelevant in the circumstances. I know of no decided case on the point. [A. E. Jones.]

Letters to the Editor

Preliminary Investigation of Offences
The Law of Scotland

Sir,

I read with some interest the appendix to the Report by the Committee appointed by " Justice " and am unable to agree that the position is as stated by Professor Smith. Having again read the *Chalmers* case I cannot find that it in any way led to a change in police practice, and, so far as I am aware, police officers have never considered that it made any change in the interpretation of the law so far as the taking of statements from accused persons is concerned.

Professor Smith has made a summary in six numbered paragraphs. To the first I have no objection but the second is correct in only one of the three points it covers. This is that if the suspect wishes to make a statement he should be cautioned and advised of his right to the services of a law agent.

It is not true that after a person has been arrested and charged with a crime there must be no *interrogation whatsoever* by the police. As I understand things the police must not interrogate an accused person about the crime with which he has been charged for the purpose of obtaining a statement which may be used against him. This permits questioning about other crimes which have been committed though such questioning must cease for the purpose of obtaining a statement to be used as evidence as soon as the prisoner becomes a suspect. Neither is questioning for other purposes excluded. For example if a man is caught at the scene of a crime with eye witnesses speaking to his participation the police are not forbidden to interrogate the accused about the identity of his accomplices who escaped at the time he was arrested. The public would be poorly served by police officers who failed to ask such questions.

The assertion in the second paragraph that, " If a suspect wishes to make a statement, he should be taken before a sheriff " does not conform to current practice and voluntary statements made to the police are accepted by the courts. Professor Smith draws attention to the *Manuel* case in which a statement was admitted and voluntary statements to the police formed part of the prosecution evidence in the trials for murder of *Menzies, Miller and Denovan* and *Boyne* in the High Court in Glasgow. In none of these cases were the statements taken in front of the sheriff or a magistrate and I do not know of any case in recent years where this practice was followed.

I think some of the confusion in this matter arises from the regrettable habit of legal gentlemen to refer to institutional writers and to cases dealing with the law before the passing of the Criminal Procedure (Scotland) Act, 1887, and the Criminal Evidence Act, 1898. In considering whether statements should be admitted as evidence the court applies the test of fairness to the accused and what was unfair under the ancient procedure is fair since the accused became a competent witness.

It is appreciated that the police should not be concerned with the punishment of offenders. We are all playing a game with rather complicated rules in which the more heinous the crime the stricter is the umpiring. If occasionally a policeman should appear to break the rules this is caused by inability to grasp their subtlety rather than bad sportsmanship. An attitude of cynical detachment is far easier on the blood pressure.

CHIEF SUPERINTENDENT,
Glasgow Police.

Books and Periodicals

Books received:

Juvenile Justice. By Ola Nyquist. Cambridge Studies in Criminology. New York: Macmillan. 1960. xii and 302 pp. 50s. net.

Prosecuting Officer. By Christopher Williams. London: Sweet & Maxwell, Ltd. 1960. 194 pp. (incl. index). 15s. net.

Sir Patrick Hastings, His Life and Cases. By H. Montgomery Hyde. London: Heinemann. 1960. 416 pp. (incl. index). 30s. net.

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1961

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.*4. *Every effort will be made to return drafts or unsuitable copy, but no guaranteee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

February 1961

In this issue

The second part of our special correspondent's article on "Chemical Tests for Intoxication" appears on p. 77. It contains criticisms of the existing law in England and Wales, and a valuable account of the law and practice in some of the countries in which chemical tests have been introduced.

Mr. Christopher Williams' note on the "Justice" Report on Preliminary Investigations which appeared in the January issue has drawn a response from the Secretary of the committee of "Justice" concerned with the report. We are publishing his letter together with a footnote by Mr. Williams in this issue, and it appears on p. 133.

"Prison, Probation and Compensation"

This issue contains an article under this title by Mr. R. W. J. Norton, based on *R.* v. *McCarthy*.[1] As will be seen, Mr. Norton is doubtful about the decision. Shortly after we received the article, it transpired that the author's comments were justified: *McCarthy* has been overruled by a full Court of Criminal Appeal in *R.* v. *Evans* decided at the end of last term.[2] It has been decided to publish the article as it stands, and to deal with the further development of the subject in "Case and Comment" next month.

Motorists and the police

The memorandum of evidence submitted by the Standing Joint Committee of the motoring organisations to the Royal Commission on the Police has had a mixed reception. The vast motoring public constitutes today a considerable public faction: and the views expressed by its energetic representatives must be, and no doubt will be, treated with respect by the Royal Commission. But it must be said that some of the committee's observations appear to reflect the desire for an ideal rather than a practicable state of affairs. In particular, the demand for uniformity of practice in the prosecution of motoring offences is, with respect, facile. Certainly, as the committee say, police action should primarily be aimed at motorists committing serious offences. Parking and minor speeding offences, however, cannot be ignored; and, assuming that a particular action amounts to an offence in law (if not, there could, one hopes, be no conviction!), it is difficult to see how motorists could be forewarned of the circumstances in which such an action was or was not likely to be visited by prosecution. Yet this is what seems to be urged by the call for "some general indications of police policy in the matter of the enforcement of motoring regulations."

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[1] *The Times*, October 26, 1960.
[2] *The Times*, December 22, 1960.

On the other hand, there are some points taken in the memorandum which seem to us clearly to deserve support or at least sympathetic consideration. Of these we would particularly mention two.

"There is clearly scope," say the committee, "for wide differences of opinion as to what constitutes obstruction." The offence of causing an "unnecessary obstruction" under the Motor Vehicles (Construction and Use) Regulations is certainly a vague one; and its enforcement by the courts has tended to be harsh. Keeping the roads clear for moving traffic has become an important social task. But this does not justify artificial interpretations of a word like "obstruction": the context is one which concerns millions of laymen in their ordinary affairs; the word is one which they know how to use; and in this context it should be used as they would use it. Further, there is ground for arguing that many benches are unrealistic in their assessment of what "obstructions" are "unnecessary." This is a matter which should one day be reconsidered by the legislature. For the time being, the motorist can ask for a sympathetic police attitude in practice, but cannot expect the police to commit themselves to any rigid principle of interpretation and action.

The other point which we would take up concerns the practice of prosecuting "for more than one offence in respect of the same incident." Too often, some think, a more serious offence is charged together with a less serious; too often, it may be feared, a compromise plea is extorted from the defendant or a compromise verdict results from the court.

Medical examination of persons charged with murder

In reply to a question in the House of Commons[3] Mr. Butler has restated the practice regarding the medical examination of prisoners charged with murder. A report on the prisoner's mental condition is furnished by the prison medical officer to the court through the Director of Public Prosecutions, who supplies a copy to the defence.

The Royal Commission on Capital Punishment approved this practice but recommended that such prisoners should also be examined by an independent psychiatrist of standing. This had been acted upon, and the Government saw no reason to make the change requested by the questioner, namely that no psychiatric examination should take place and no report be given to the Director except with the consent of the accused person or his legal advisers.

Criminal assaults on children—press reports

Sections 39 and 49 of the Children and Young Persons, Act, 1933, contain restrictions on the publication of particulars of children or young persons concerned in court proceedings.

A recent debate in the House of Commons[4] drew attention to a problem that is not covered by these sections—namely, the disclosure by the police to the press, and the publication by the press, before the institution of proceedings, of the name and address of a young victim of a criminal assault. Such disclosure, and the consequent publication, is wholly within the discretion of the police force concerned.

It was pointed out that publication of the victim's name and address can lead not only to additional distress to the child and his family, but also to the possibility of intimidation of the victim by the offender.

The debate was confined to the practice of the Metropolitan Police. Mr. Vosper for the Home Office said that he assumed that such information is only given to the press where disclosure might assist in tracing the offender. One indeed hopes that this assumption is justified.

Criminal Justice Bill

This Bill has had a varied history in the Committee stage which is not yet completed. We will publish an account of the main provisions in next month's issue.

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[3] H.C. Deb., Vol. 632, col. 74.

[4] H.C. Deb., Vol. 632, cols. 561–568.

Judicial appointments

The New Year saw a considerable increase in the size of the judiciary. The following were appointed to the Queen's Bench Division of the High Court:

Mr. Stephen Gerald Howard, Q.C.
Mr. Geoffrey de Paiva Veale, Q.C.
Mr. John Megaw, Q.C.
Mr. Frederick Horace Lawton, Q.C.
Mr. John Passmore Widgery, Q.C.

In addition, Judge Sir Basil Neild, C.B.E., was appointed a judge of the High Court on the retirement of Byrne J.

Mr. Richard Martin Bingham, T.D., Q.C., has been appointed Recorder of Oldham.

Sir Arthur Brian Boyle, Q.C., has been appointed Recorder of Sunderland.

Mr. Robert Gordon Clover, T.D., Q.C., has been appointed Recorder of Blackpool.

Sir John Robertson Dunn Crichton, Q.C., has been appointed Recorder of Manchester.

Mr. T. R. Fitzwalter Butler and Mr. O. Searight Macleay have been appointed deputy chairmen of Middlesex Quarter Sessions.

Judge Norman Alexander Carr has been appointed chairman of Northamptonshire Quarter Sessions.

Mr. Victor Albert Charles Durand, Q.C., has been appointed deputy chairman of Warwickshire Quarter Sessions.

Mr. Nigel Francis Maltby Robinson has been appointed deputy chairman of Nottinghamshire Quarter Sessions.

Chemical Tests For Intoxication – II

By A SPECIAL CORRESPONDENT

Disadvantages of present legislation

Under the existing legislation in this country the results of chemical tests of concentration of alcohol in the blood are for all practical purposes valueless except in occasional support of the evidence of a doctor or police officer. In a recent study of urine alcohol tests carried out on 312 persons arrested for allegedly driving under the influence of drink, the conclusion was reached that the decisions of the courts are not influenced at all by legal evidence of urine alcohol concentrations.[1] The law requires the suspect personally to have been incapable of having had proper control of his vehicle by reason of alcohol or a drug, and this has to be proved beyond reasonable doubt by objective observation or clinical demonstration. The relative insensitivity of the available clinical tests render it unlikely that sufficient evidence can be produced by such tests until the concentration of alcohol in the blood has exceeded 150 mg./100 ml., by which time serious deterioration of driving performance has been incurred. Even where the doctor's certificate that the suspect was incapable of having proper control of the vehicle is forthcoming, such evidence is peculiarly susceptible to cross-examination owing to the multiplicity of conditions other than alcoholic intoxication which might conceivably give rise to similar symptoms and signs.

The position is barely satisfactory where doctors experienced in this kind of examination are available to the police. In other areas where the police authorities are unwilling to appoint designated police surgeons, the situation is completely unsatisfactory and results in the police having to hawk round the ever decreasing circle of doctors who are willing to carry out such examinations. One experience at the hands of competent counsel in cross-examination is enough to scare off for life the doctor inexperienced in this work. How the concept of justice can be reconciled with the failure to appoint experienced police surgeons in so many areas is difficult to see. Not only does it mean that examination of persons suspected of being under the influence of alcohol may not be adequately carried out, but other complex examinations such as those of victims of sexual offences, which the average medical student never sees, will also be carried out by inexperienced practitioners. Any doubts about this are removed by the decision of the General Medical Council some years ago that forensic medicine need no longer be treated as a separate subject for the purpose of the medical syllabus. At least one ancient and famous university has not included a question on forensic medicine in its final examination for a decade or more.

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[1] Walls, H. J. (1958) *Brit.Med.J.* **1,** 1442.

In some parts of the country the police no longer rely on clinical evidence of intoxication and require medical evidence only so far as is necessary to exclude any other medical conditions which may be responsible for the suspect's condition. Evidence of intoxication is given solely by the police officers who detained the suspect and it is said that this has resulted in a higher rate of convictions. The scientific limitations of clinical tests for intoxication are admitted, but this does not mean that the evidence of a police officer untrained in the observation of clinical signs is any more reliable. The only advantage enjoyed by the arresting officer is that he has seen the suspect at the time the offence is alleged to have been committed, and in this respect, and this respect alone, his evidence as to intoxication is superior. The inevitable delay before the police surgeon can be called to examine the suspect is an important factor, but surely it is dangerous in the extreme to rely exclusively on the evidence of police officers untrained in clinical observation in order to decide whether a person is under the influence of alcohol. The almost stereotyped way in which police officers give evidence of intoxication suggests that their observations are not infrequently coloured by what they are expected to say to prove intoxication instead of what they have actually seen. This results from a passive and entirely subconscious self-deception which is all too common, and does not, of course, import any dishonesty on the part of the police. The capacity of reliable, independent, unbiased scientific observation is something which is achieved only after years of training and is nowhere more marked than in the field of clinical diagnosis.

Other disadvantages of the existing legislation are well known, in particular the opportunities for jury sympathy, which result in a large number of cases electing to be tried on assize. In 1957 91 per cent. of offences of driving under the influence of drink or drugs dealt with summarily in magistrates' courts resulted in convictions. Strictly comparable figures for cases coming before courts of quarter sessions are not available, but only 48 per cent. of persons tried at courts of quarter sessions and assize were convicted.[2] It is interesting to compare the position with Scotland where the Procurator-Fiscal decides whether the person charged with this offence shall be dealt with summarily or not, and there is no right of election to trial by jury. Consequently, the average case is dealt with at the sheriff's court without a jury. Out of 605 prosecutions in 1958, only twenty-eight were acquitted or withdrawn. The 577 convictions in Glasgow with a population of little over one million inhabitants make an interesting comparison with the 584 convictions obtained in London in the same period, but with a population many times the size of Glasgow. Whereas the number of convictions for reckless or dangerous driving in Glasgow barely exceeded those for driving under the influence, the proportion in England and Wales is about twelve to one. It only remains to add that a comprehensive urine alcohol testing programme has been in force in Glasgow for the past eighteen years, and considerable attention is paid to the results by the courts.

In addition there is the capacity of a suspect to present an appearance of relative sobriety for a short period while under observation at the police station owing to realisation of his predicament. This results from a " shock " reaction in which the suprarenal glands produce an outflow of epinephrine which temporarily counteracts the effect of alcohol. Once the emergency has passed the outflow ceases and the suspect relapses into a state of intoxication. It occasionally happens that a person is certified as being fit to be in charge of a motor-vehicle by the doctor, only to be carried out of the police station on a stretcher afterwards.

Finally, is must not be forgotten that there is a small proportion, possibly 1 per cent. of all those charged,[3] whose impairment is primarily due to some other condition, *e.g.*, unsuspected head injury, diabetic conditions, etc. There is, of course, no danger of this being forgotten in this country as it is put up as a defence, often successfully, in a large proportion of cases. Evidence of the concentration of alcohol in the blood is the best possible safeguard against such persons being wrongly convicted, because clinical examination is unable to give more than a very rough guide to the contribution of any alcohol the suspect may have taken. Chemical tests for the concentration of alcohol in the blood provide a solution to all these disadvantages and it is important to study the experience of those countries which have already introduced a chemical testing programme.

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[2] *Parliamentary Debates*, House of Commons, Vol. **605**, col. 167 (May 14, 1959).

[3] Ward Smith, G. H. L. (1960) *Crim.Law Quart.* **3**, 81.

Legislation in other countries

An increasing number of countries have adopted chemical tests for intoxication, and there would appear to be two types of legislation. First, laws which permit fixed concentrations of alcohol in the blood to be presumptive that the subject is, or is not, under the influence of alcohol, and secondly, laws which provide automatic conviction upon proof that a fixed concentration in the blood is present. The most well-known example of the first type of legislation is section II–902 of the United States Uniform Vehicle Code which was drawn up in 1944 by the Committee on Uniform Traffic Laws and Ordinances of the National Conference on Street and Highway Safety, and has since been adopted, apart from minor modifications, by at least twenty-three states. The effect of this legislation is that a person found driving a motor-vehicle with a blood alcohol concentration in excess of 150 mg./100 ml. is presumed to be " under the influence of intoxicating liquor." Under 50 mg./100 ml. the presumption is that the person is not under the influence, and if the concentration is between 50 mg./100 ml. and 150 mg./100 ml., there is no presumption but the fact may be considered along with the other evidence. The above figures are approximate conversions because the statutory figures are given as percentages of alcohol in the blood on a weight-for-weight basis. It is important to note that the presumptions are only presumptions: section B (4) provides expressly that they do not limit the introduction of any other competent evidence bearing on the question.

There can be no doubt that the adoption of the uniform code by so many states has cut down the number of accidents due to alcohol. The main difficulty has been in obtaining samples from suspects, a point which will be considered shortly, and the inevitable, though apparently unexpected, result that it is in practice almost impossible to get convictions under 150 mg./100 ml. even in cases where the suspect was quite obviously unfit to be in charge of a motor-vehicle. The result has been that increasing pressure has been brought to lower the 150 mg./100 ml. level. This has been recommended both by the National Safety Council and by the House of Delegates of the American Medical Association, and has already been introduced in New York State as from October 1, 1960.[4] A concentration of 100 mg./100 ml. in New York is now

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[4] Motor Vehicle Code, ch. 184, 1960.

prima facie evidence that the suspect's ability to operate a motor-vehicle or motor-cycle was impaired, while the 150 mg./100 ml. level is maintained as *prima facie* evidence of intoxication. The evidence may be obtained from specimens of blood, breath, urine or saliva. The distinction between impairment and intoxication will be considered shortly. Other countries or states which have adopted this type of legislation include Victoria,[5] Western Australia,[6] and Iceland.[7]

The second type of legislation, which provides automatic conviction upon proof of a blood alcohol concentration in excess of a given level, was introduced in Norway as long ago as 1926,[8] and the level there is now 50 mg./100 ml. The minimum penalty for first offenders is disqualification from driving for one year, and a second conviction carries a penalty of disqualification for life. Other countries adopting 50 mg./100 ml. include Sweden.[9] Belgium [10] and Western Germany have both adopted 150 m.g./100 ml., with a slightly lowered level (130 mg./100 ml.) for motorcyclists in Western Germany, the reason for this distinction being obscure.

Obstacles to a chemical testing programme

One of the main difficulties in those countries adopting legislation based on chemical tests has been the obtaining of the necessary samples. The difficulty has been resolved in the United States in an ingenious fashion by what is known as the "implied consent" law. This was introduced in New York State in 1953 when it was provided that it should be a condition attached to grant of a driving licence that the holder would consent to providing a sample of breath, blood, urine or saliva for analysis if so requested by a police officer having reasonable grounds to suspect the driver was intoxicated. The law provides that, in the case of blood, only a qualified physician may withdraw the sample, and the result of all tests carried out must be made available to the suspect who is, in addition, entitled to have a physician of his own choosing to administer additional chemical tests. The law came under immediate fire from the constitutional point of view and was held unconstitutional by the New York Supreme Court on the grounds that there was no provision limiting its operation to cases where there had been a lawful arrest, and that there was no provision for an appeal against revocation of licence.[11] Accordingly section 1 of the 1953 Act was revised [12] to remedy these defects, and in a later case the Supreme Court upheld the revised Act *in toto*.[13] The effect of this was to override the various other constitutional objections to the Act, notably the supposed infringement of the Fifth Amendment which protects persons against the effect of self-incriminatory evidence. Although the Fifth Amendment is applicable only to federal proceedings it has, in fact, been accorded by many states to state proceedings. The object of the amendment is to make it necessary for the police or prosecutor to exert all efforts to supply dependable evidence, instead of relying on less dependable evidence obtained by compulsory interrogations. But it has been held that chemical test specimens, even if obtained against the will of the suspect, are admissible as constituting "physical" rather than "testimonial" evidence. Furthermore, chemical tests are now regarded as the best procurable evidence of intoxication in the United States, and superior to any other evidence the prosecution might be able to produce. Another objection was based on the grounds that it constituted unlawful search and seizure. Hence a defendant in Wisconsin was successful in challenging the admissibility of the result of a blood test because the blood was taken from him while he was semi-conscious.[14] The Supreme Court made the curious distinction of a search incident to an arrest (which it considered lawful) and a search prior to an arrest (which is considered unlawful). However, the California Supreme Court has held that "a search may be made before or after the arrest so long as reasonable grounds for making an arrest existed at the time of the search." [15] The logical and practical answer to these problems is to place the motorist under formal arrest before taking a specimen. Finally, there was the question of infringement of the Fourteenth Amendment which provides that "no person shall be deprived of his life, liberty or property without the due process of law." However, the United States Supreme Court has held that there is nothing "brutal" or "offensive" in the taking of a blood specimen from an unconscious motorist, and therefore no violation of "due process."[16] The Supreme Court did, however, warn that "this is not to say that the indiscriminate taking of blood under different conditions, or by those not competent to do so, may not amount to such 'brutality' as would come under the *Rochin* rule." The *Rochin* rule concerned a case in which a stomach pump had been used on a suspected drug pedlar who had tried to conceal the evidence by swallowing it. The Supreme Court held this to be a violation of the "due process" clause of the Fourteenth Amendment as the evidence had been obtained by "brutal" and "offensive" methods.[17]

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[5] Crimes and Criminal Offenders Consolidation Act, 1958, s. 408 (2).

[6] Traffic Acts, 1919–1957, s. 32A, as amended by Traffic Act (No. 2) of 1958, s. 7.

[7] *Personal Communication* (1959) Laeknafélag Islands: 50–120 mg./100 ml. is evidence of impairment of ability to drive, above 120 mg./100 ml. is evidence of complete inability to drive.

[8] Motor Vehicle Act (No. 2) of 1926, s. 17, as amended by the Act of 1959.

[9] Traffic Code of Regulations of 1951, para. 25.

[10] Code d'instruction criminelle, Arts. 2–3, as amended by the Arrêté Royal of June 10, 1959.

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[11] *Schutt* v. *McDuff* (1954) 127 N.Y.S. 2d 116.

[12] Public Law (1954), c. 320, New York State.

[13] *Anderson* v. *McDuff* (1955) 143 N.Y.S. 2d 257.

[14] *State* v. *Kreening* (1956) 274 Wis. 266; 79 N.W. 2d 810.

[15] *People* v. *Duroncelay* (1957) 48 Cal. 2d 766; 312 P. 2d 690.

One further obstacle to chemical tests for intoxication appears to have been found in Norway, namely attempts by motorists to vitiate the result by taking alcohol immediately after the accident or other event which gives them cause to believe they may be detained by the police. Since conviction ought to depend on the concentration of alcohol in the blood at the time the suspect was in charge of his vehicle, the taking of alcohol after he has left his car and before a chemical test sample can be obtained would be a serious obstacle to the police. It is even said that many motorists carried hip flasks containing spirits for just this purpose. Accordingly, in 1959, the Norwegian Motor Vehicle Act was amended to provide that the driver of a motor-vehicle must not taste alcohol or take any other form of intoxicant or narcotic during the first six hours after he has ceased driving, if he realises or is bound to realise that his driving may be the subject of police investigation. The ban does not, of course, apply after the police have taken a test, or have decided that no test need be taken.

The introduction of a chemical testing programme in this country would be accompanied by many problems, some of which would be peculiar to this country. The experience of other countries suggests that most obstacles can be surmounted. In particular the constitutional validity of chemical tests, which has been a major obstacle in the United States, is unlikely to be a factor of any significance in this country, as there is no fixed constitution through which the courts could declare legislation concerning chemical tests invalid as contrary to constitutional principles.

The problem in this country

Reduced to its simplest terms the problem is this. The available evidence proves beyond reasonable doubt that even after only a few drinks the concentration of alcohol in the blood may be raised to a level where serious impairment of driving performance occurs, and, consequently, increased liability to accident. But, without entering into controversies as to the legal definition of a crime, the ordinary citizen instinctively recoils from labelling as a criminal a person who drives after having had only a few drinks. Indeed the person who has had only a few drinks often believes that he is driving exceptionally well. Those countries with a more enlightened approach to the problem of alcohol and driving have long recognised the difficulty, and have drawn a distinction between driving while severely intoxicated and driving while performance is *impaired* by alcohol. The former, quite properly, remains a serious criminal offence, punishable by disqualification, fines or imprisonment, while the latter is regarded as a more technical offence which need not necessarily come before the courts at all, except, of course, where the driver appeals against the penalty, which is generally, and most appropriately, disqualification for a stated period. The principle was recently well stated by Governor Rockefeller of New York in approving his State's recent legislation.[18] " Existing law has proved inadequate in this regard in that it is directed towards only the most serious offender, the driver with a blood alcohol level of at least 0·15 per cent. (approximately 150 mg./100 ml.). In requiring that the drinking driver be classified as a criminal, present law has not proved adequate to remove the drinking driver from our highways.

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[16] *Breithaupt* v. *Abram* (1957) 352 U.S. 432.
[17] *Rochin* v. *California* (1952) 342 U.S. 165.

" The Bill creates a presumption that a driver's ability to operate a motor-vehicle is impaired if the driver has 0·10 per cent. or more by weight (approximately 100 mg./100 ml.) of alcohol in his blood. This presumption, if not overcome, will result in conviction of the new traffic infraction. The privilege to drive must be suspended for the first two convictions and a licence must be revoked after the third conviction within three years. The focus of the Bill is upon removing from the highway the driver whose ability is impaired rather than upon branding him as a felon or a misdemeanant. The existing provisions of law remain to cope with the more serious offenders.

" This pioneering legislation, the first of its type in the United States, is a significant step in our current traffic safety efforts. We must continue to be alert to other opportunities in this critical area of human concern."

The lesson to be learnt from the experience of other countries is that the first objective is to amend the substantive law with relation to the drinking-driving offence. Attempts to graft chemical tests on to an existing law which is not designed to accommodate them are doomed to failure. If the existing offence in this country is to remain without addition or modification it must follow that any statutory presumption of intoxication based on chemical tests will be linked to a relatively high concentration of alcohol in the blood, which is unlikely to be below 150 mg./100 ml. The result will be that convictions of the severely intoxicated driver will be made somewhat easier, but the real danger, the mildly intoxicated driver with serious impairment, will remain. Furthermore, whatever statutory provision there is to the opposite effect, it is bound to follow in practice that anyone whose blood alcohol is found to be below the relatively high level adopted will be in a strong position regardless of his individual degree of impairment.

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[18] " Messages of the Governor " accompanying New York State Motor Vehicle Code, 1960, ch. 184.

There is a great danger of the cart being put before the horse in relation to chemical testing for intoxication in this country. So long as driving under the influence of alcohol is punishable on indictment and conviction accordingly carries a heavy social stigma, there is politically very little possibility of adopting a realistic concentration of alcohol in the blood as presumptive of impairment. It is not necessary to brand as a criminal the driver who has taken only a few drinks in order to persuade him not to take to the road. All that is needed is a reliable method of disqualifying him from driving for a certain period and without the clamour of a public prosecution. A right of appeal to the courts is, of course, essential but under a reliable chemical testing programme, with proper safeguards against abuse, the right of appeal might rarely have to be exercised. The Swedish method is not without interest in this respect, although it has been termed " legalised blackmail " with some justification. The driver who is apprehended by the police upon a reasonable suspicion is asked to submit to an " alcotest " breath test. This merely means blowing down a tube containing crystals which give a fairly reliable indication whether the blood alcohol is above or below 50 mg./100 ml. If the result is positive the driver is asked whether he accepts the result of the test. If he agrees he is penalised accordingly. If he does not agree he is offered the alternative of accompanying the police back to the police station where a blood sample will be taken. If the concentration of blood from the sample is found to exceed 150 mg./100 ml. a prison sentence is almost inevitable. The person who has had only a few drinks receives every safeguard under this procedure and it is only the person who has drunk a considerable quantity who has anything to fear. Presumably the police would apprehend in any case a driver who appears grossly inco-ordinated, and it is only the border line cases which would be offered the choice. However, it has been said that most drivers are only too ready to accept the alcotest result. The Scandinavian countries have had a chemical testing programme for some considerable time and most drivers carry round with them small cards which give the amounts of alcohol which it is safe to take without running the risk of reaching the various concentrations prescribed by law.

Lack of statistical evidence

Although it would be surprising if the concentration of alcohol in the blood shown to impair seriously driving ability or to increase the hazard of accident, varied from country to country, the relative absence of reliable statistical material in this country is thought to be a serious political obstacle to the introduction of a chemical testing programme. It would have been a comparatively simple matter to arrange for all traffic fatalities to be tested for the concentration of alcohol in tissues, and this is carried out as a routine in most other countries. Indeed, it might be considered essential to the ends of justice that the concentration of alcohol in the tissues of the pedestrian victim should be estimated as constituting an otherwise unsuspected contribution to the cause of the accident. Unfortunately, coroners' inquests often omit this essential requirement with the result that comprehensive figures are not available for statistical purposes. Indeed in many cases even post-mortem examinations are omitted in traffic fatalities, the coroner's jury arriving at its verdict by that process of inspired guesswork which is, unfortunately, so characteristic of inquests in some parts of the country.

In addition the blood alcohol concentrations of persons attending hospital as a result of traffic accidents should be estimated as a routine in order to provide further statistical material. This again is carried out in many countries but the problems associated with getting the victim's consent in this country have discouraged such action. A victim is unlikely to give his consent if he is told, as he should properly be told in obtaining his consent, that the hospital records may be subpoenaed and evidence of his blood alcohol concentration given against him. However, it should not be impossible to devise a scheme whereby the laboratory result cannot be traced to the individual victim. Finally, a survey should be conducted of the blood alcohol concentrations of persons using the road who are not involved in accidents so that there may be an adequate statistical control. Breath analysis would be an excellent aid to such a survey and problems of consent should be minimal if convincing methods to ensure anonymity are used.

The Administration of Justice Act, 1960

By D. G. T. Williams, M.A., LL.M.

Barrister-at-Law, Lecturer in Law, University of Nottingham

The Administration of Justice Act, which was introduced in the House of Lords early last year, makes several important changes in the law, especially in relation to criminal appeals. It creates a uniform though restricted avenue of appeal to the House of Lords for prosecutors and defendants from decisions of a Divisional Court of the Queen's Bench Division, in a criminal cause or matter, and of the Court of Criminal Appeal and the Courts-Martial Appeal Court. Proceedings in connection with habeas corpus and contempt of court are, because of the special considerations they involve, accorded special treatment: the Act provides for appeals and for certain procedural and substantive amendments in these two fields of law. Finally there is one specific alteration of the law in respect of certiorari—this will be considered along with general criminal appeals.

Criminal appeals

Appeals from the Court of Criminal Appeal used to be dependent upon the *fiat* or certificate of the Attorney-General which could be sought by the Director of Public Prosecutions or by the prosecutor or defendant. Before granting a certificate the Attorney-General had to be satisfied that there was at stake a point of law of *exceptional* public importance and also that it was in the public interest that a further appeal be brought. About a hundred applications were made to him each year but the average number acceded to was small. From the passing of the Criminal Appeal Act, 1907, to October, 1960, twenty-three successful applications were made, six at the instance of the prosecution and seventeen at the instance of the defence; eight of the appeals were ultimately allowed. Controversy periodically arose over the refusal of a particular application, the well-known example being that of Sir Roger Casement, and a strong body of opinion consistently opposed the entrusting of a "quasi-judicial" function to a law officer who might in some cases have to act as judge is a cause in which he was himself concerned as counsel.[1]

The legislators of 1907, however, clearly never intended that appeals to the House of Lords should become frequent. The creation of a Court of Criminal Appeal was itself but the outcome of many years of pressure and it would have been inconceivable to leap from a system that allowed no regular avenue of appeal to a two-tier appeal system In fact there are still many people who, impressed by the characteristic speed of our criminal process and by the admiration that it has earned, believe that for most purposes the Court of Criminal Appeal should remain the final tribunal.

Section 2 of the Act: appeals to the House of Lords

It is provided in section 2 of the Act that henceforth appeals from the Court of Criminal Appeal to the House of Lords shall depend, not upon a law officer's discretion, but upon the Court of Criminal Appeal certifying that a point of law of *general* public importance is involved and upon leave to appeal being granted, either by that court or by the House of Lords, on the ground that the point is one which ought to be considered by the House of Lords. The Solicitor-General, when moving the second reading of the Bill in the House of Commons, suggested that the object of the criteria restricting an appeal is to ensure that the Lords shall pronounce only upon points of law that are likely to arise " in more than an occasional isolated case " and that they shall not be troubled with points of general importance " which are so well-established that they might not now be called in question." [2]

Appeals to the House of Lords in civil cases are allowed relatively frequently. Criminal cases, it is claimed, do not involve " the kind of intricate analyses of legal principle " [3] that civil matters often demand; and it has been pointed out by Lord Evershed that a high proportion of the energies of our supreme judicial tribunal " is directed to the exposition of severely technical modern legislation, particularly the Revenue Statutes." [4] By contrast many of the appeals heard in the Court of Criminal Appeal relate to a few familiar topics of criminal law. The House of Lords, however, is a tribunal of less fluctuating composition and one that would be able to devote more time and consideration to difficult and disputed questions. It may be that the courts will be led by the statutory change of words from "exceptional" to "general" to be somewhat more liberal than the Attorney-General in allowing a second appeal; but there is unlikely to be any danger of "flooding" the House of Lords with criminal cases. In the long run a feasible alternative to seeking more criminal judgments of the House of Lords might be the institution of a permanent Court of Criminal Appeal.[5]

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[1] See " Appeals to the House of Lords " [1957] Crim.L.R. 566.

[2] 625 H.C. Deb. 1696–97 (July 1, 1960).

[3] 625 H.C. Deb. 1745.

[4] *The Impact of Statute on the Law of England* (Maccabaean Lecture in Jurisprudence, 1956), XLII Proceedings of the British Academy 247, 256.

Appeals from the Divisional Court

Criminal appeals *can*, despite what has been said above, demand the exposition of severely technical modern legislation. Yet the ultimate tribunal on a great number of technical points has been a Divisional Court of the Queen's Bench Division. A Divisional Court hears appeals by case stated from magistrates' courts and from the appeals committees of quarter sessions, and also confines inferior courts within their legitimate sphere of powers and duties by virtue of the prerogative orders of certiorari, prohibition and mandamus. No further appeal lay when its decision was in "a criminal cause or matter."[6] Many of the cases heard and decided in the magistrates' courts and subsequently considered on appeal or review in the Queen's Bench Division are of the greatest significance: they range in content from civil liberties to the interpretation of a subsection of some recently enacted legislation. To stultify the process of appeal and review stemming from summary trials has long been deplored by the judges themselves, notably by Lord Goddard who said in a judgment delivered in 1958:

> "I continue to hope that the time will come when by leave and subject perhaps to terms as to costs it will be possible

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[5] See generally—Seaborne Davies, "The Court of Criminal Appeal: The First Forty Years" (1951) 1 J.S.P.T.L.(N.S.) 425; Lord Goddard, "The Working of the Court of Criminal Appeal" (1952) 2 J.S.P.T.L.(N.S.) 1. A leading article on the question of a permanent Court of Criminal Appeal appeared in *The Guardian* (p. 4) on July 2, 1960.

[6] Supreme Court of Judicature (Consolidation) Act, 1925, s. 30 (1). See, as to appeals by case stated: *Mellor* v. *Denham* (1880) 5 Q.B.D. 467; *Payne* v. *Wright* (1892) 61 L.J.(M.C.) 114; *Seaman* v. *Burley* [1896] 2 Q.B. 344; *Robson* v. *Biggar* [1908] 1 K.B. 672; as to prohibition: *R.* v. *Garrett* [1917] 2 K.B. 99; *R.* v. *Appeals Committee of London Quarter Sessions* [1946] 1 K.B. 176; as to mandamus: *Ex p. Schofield* [1891] 2 Q.B. 428; *R.* v. *Tyler* [1891] 2 Q.B. 588; *R.* v. *Young* (1891) 66 L.T. 16; *R.* v. *Army Council* [1940] 1 K.B. 719; as to certiorari: *R.* v. *Fletcher* (1876) 2 Q.B.D. 43; *R.* v. *Whitchurch* (1881) 7 Q.B.D. 534; *Provincial Cinematograph Theatres, Ltd.* v. *Newcastle-upon-Tyne Profiteering Committee* (1921) 90 L.J.(K.B.) 1064.

> to take either to the Court of Appeal or perhaps direct to the House of Lords a decision of this court, although it relates to a criminal cause or matter. The complexity of modern legislation I feel sure makes this desirable." [7]

Section 2 of the Act now provides for a right of appeal from a decision of a Divisional Court of the Queen's Bench Division in a criminal cause or matter direct to the House of Lords, subject to the same requirements as those that will apply to appeals from the Court of Criminal Appeal.

In the event of a permanent Court of Criminal Appeal being set up it is conceivable that the present criminal appellate and review jurisdiction of the Divisional Courts of the Queen's Bench Division would be merged in the jurisdiction of the new tribunal. Meanwhile, in the absence of a combined permanent body, it is desirable that the Divisional Courts and the Court of Criminal Appeal should run parallel so far as possible in their approach to such matters as the operation of the doctrine of precedent. In criminal cases the Divisional Courts have hitherto adhered strictly to the rule of *stare decisis*, though the present Lord Chief Justice has shown that he was prepared, so long as there was no appeal, not to be bound by a bad precedent unless there could be said to be no real distinction.[8] It is to be hoped that the granting of a right of appeal upon the same terms as from the Court of Criminal Appeal will lead, not to a renewed emphasis upon binding precedents, but rather to an approach that is akin to that presently followed by the Court of Criminal Appeal.[9] A Divisional Court and the Court of Criminal Appeal are both courts of similar fluctuating membership and each is normally presided over by the Lord Chief Justice; they both deal with questions of criminal law and to distinguish between them simply on grounds of subject-matter would be both inviting and misleading. The present Act seems to recognise that they stand upon what is virtually an equal footing.

Difficulty may still arise in Divisional Court cases, especially in proceedings concerning prerogative orders, as to the classification of criminal and civil causes and matters. If a cause is classified as criminal or civil then a party's right of appeal is respectively much more restricted or much freer, and the situation could arise where a prospective appellant or a prospective respondent might feel aggrieved by the classification and desire to challenge it on appeal. One possibility is that the appeal on this preliminary issue should be heard by the House of Lords if the cause has been initially classified by a Divisional Court as criminal and by the Court of Appeal when it has been classified as civil.

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[7] *Smith* v. *Wyles* [1959] 1 Q.B. 164, 176–177. See also *Stone* v. *Boreham* [1959] 1 Q.B. 1, 9; [1958] Crim.C.C. 56–57, 143–145.

[8] *Cogley* v. *Sherwood* [1959] 2 Q.B. 311, 327. See generally—Winder, "Divisional Court Precedents" (1946) 9 M.L.R. 257; Stone, "Stare Decisis in the Divisional Court" (1951) 14 M.L.R. 219; C. K. Allen, *Law in the Making* (6th ed., 1958), at 232–233; *Huddersfield Police Authority* v. *Watson* [1947] K.B. 842, 847; *Younghusband* v. *Luftig* [1949] 2 K.B. 354, 361; *Melias* v. *Preston* [1957] 2 Q.B. 380, 388; *Kahn* v. *Newberry* [1959] 2 Q.B. 1, 13.

[9] See Allen, *op. cit.*, *supra*, note 8, at 234–235.

Incidental provisions

The Act includes several sections incidental to the main provisions about appeals.[10] These incidental sections relate to the time within which to apply for leave to appeal, to detention and bail while an appeal is pending, to the computation of sentences when bail has been granted, to the restitution and revesting of property, to legal aid and costs on appeal from the Court of Criminal Appeal, and to specific questions of procedure. Section 3, which provides, subject to safeguards, that appeals in capital cases " shall be heard and determined with as much expedition as practicable " is perhaps intended to reassure us that Caryl Chessman's ordeal could not happen here. Section 10, together with Schedule I the Act, extends all the new appeal provisions to the Courts-Martial Appeal Court.

Certiorari

A further provision, but one which has no direct relation to the other sections of the Act, is that which gives to a Divisional Court of the Queen's Bench Division, on hearing an application for certiorari, power to substitute for a sentence passed without jurisdiction by a magistrates' court or by the appeals committee of quarter sessions any sentence which the magistrates' court had power to impose. This will dispose of the difficulty that arose in 1948 when a Divisional Court reluctantly quashed a road traffic conviction because the magistrates had imposed a fine that exceeded the maximum penalty allowed; the sentence and the conviction were held not to be severable.[11] In a later case in the Court of Criminal Appeal Lord Goddard said *obiter* of the rule of non-severability:

> " It is quite absurd because if a man appeals against his sentence to quarter sessions, quarter sessions can put the matter right. If a man is convicted on indictment and an

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[10] ss. 2 to 10.

[11] *R.* v. *Willesden Justices*; *ex p. Utley* [1948] 1 K.B. 397. See also *R.* v. *Arundel Justices*; *ex p. Jackson* [1959] 2 Q.B. 89; [1959] Crim.C.C. 153.

> illegal sentence is passed, the court can put it right. It is only where a sentence is passed by magistrates and is challenged by means of certiorari that the court has no power to put it right. . . ." [12]

Section 16 of the Act is designed to close this "unfortunate hiatus" in the law.

Contempt of court: the need for reform

Some reform of the law of contempt of court was long overdue. It is a field of law that has for years provoked accusations of uncertainty and even arbitrariness; and it is also one that is subject to the distinction between civil and criminal causes:

> "Of course there are many contempts of court that are not of a criminal nature; for instance when a man does not obey an order of the court made in some civil proceeding, to do or to abstain from doing something—as when an injunction is granted in an action against a defendant and he does not perform what he is ordered to perform, and then a motion is made to commit him for contempt. That is really only a procedure to get something done in the action and has nothing of a criminal nature in it." [13]

Much more than in other fields, however, the real dividing line between what is civil and what is criminal has been hazy and variable, and no one has ever satisfactorily defined the two categories.[14] Most writers are content simply to distinguish between wilful disobedience to the orders or other processes of the court (civil contempt), and conduct which is calculated to obstruct or prejudice the admission of justice (criminal contempt), and then to classify criminal contempt under such traditionally-accepted heads as contempt committed in the face of the court, abusing parties or witnesses concerned in causes before the court, the publication of matter which scandalises the court and the publication of matter in respect of a pending civil or criminal case which is calculated to prejudice a fair trial.[15] A type of contempt normally associated with the latter head but which has itself defied easy classification is that of publishing matter relating to proceedings heard in private.[16]

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[12] *R.* v. *Green* [1959] 2 Q.B. 127, 132.

[13] *Scott* v. *Scott* [1912] P. 241, 249, *per* Vaughan Williams L.J.

[14] See Fischer, "Civil and Criminal Aspects of Contempt of Court" (1956) 34 Can.Bar Rev. 121; Beale, "Contempt of Court, Criminal and Civil" (1908) 21 Harv.L.R. 161.

[15] For a comprehensive treatment of the various heads of criminal contempt, see Halsbury's *Laws of England* (3rd ed., 1954), Vol. 8, at 3–20.

It is accepted as inherent in the status of a superior court that there shall exist, with safeguards, a power to punish swiftly any wilful disobedience of the orders of the court. From an order of committal or attachment for civil contempt there has always existed an opportunity to appeal.[17] That a person in civil contempt may be committed indefinitely to prison might suggest the possibility of abuse, but apologies and undertakings on the part of the contemnor usually ensure fairly early release. During the time for which records exist, the longest period a person has served as a penalty for civil contempt is two years, eleven months.[18] Inferior courts are also entrusted with certain powers of committal but these are more circumscribed and are usually specified by statute.

Criminal contempt of court has by contrast been highly controversial. As a common law misdemeanour it can in theory be punished by a limitless fine and by imprisonment of any length. It is the one crime that is invariably dealt with summarily by a superior court,[19] whether or not that court is normally concerned with criminal matters, and from a conviction there has hitherto been no right of appeal.[20] It has been shown and accepted that the historical justification for summary trial in certain forms of criminal contempt is slender, and lawyers and laymen alike have, over the years, been critical of the process.[21] The judges have consistently stressed caution in its exercise.[22] A cursory reading of the law reports for the last quarter of the nineteenth century suggests that no leading case was complete without its application to commit or attach, and the courts ultimately curtailed such a pastime lest the doctrine of contempt itself should become an object of contempt.[23]

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[16] See Goodhart, "Newspapers and Contempt of Court in English Law" (1935) 48 Harv.L.R. 885, 904–906; *Re Martindale* [1894] 3 Ch. 193; *Scott* v. *Scott* [1913] A.C. 417; *Re De Beaujeu's Application* [1949] Ch. 230; *Alliance Perpetual Building Society* v. *Belrum Investments, Ltd.* [1957] 1 W.L.R. 720.

[17] *Scott* v. *Scott* [1912] P. 241, 285, *per* Fletcher Moulton L.J.

[18] 609 H.C. (Written Answers) 166 (July 23, 1959).

[19] The last reported case of trial by indictment seems to be *R.* v. *Tibbitts and Windust* [1902] 1 K.B. 77 (Court for Crown Cases Reserved).

[20] *O'Shea* v. *O'Shea and Parnell*; *ex p. Tuohy* (1890) 15 P.D. 59. The Criminal Appeal Act, 1907, permits appeals to the Court of Criminal Appeal only from convictions upon indictment and information.

[21] See Fox, *The History of Contempt of Court* (1927); Frankfurter and Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers" (1924) 37 Harv.L.R. 1010, 1042–1052; Beale, *supra*, note 14; Laski, "Procedure for Constructive Contempt in England" (1928) 41 Harv.L.R. 1031.

[22] See *Hunt* v. *Clarke* (1889) 58 L.J.Q.B. 490, 493; *Re Clements*; *Republic of Costa Rica* v. *Erlanger* (1877) 46 L.J.(Ch.) 375, 383; *Re Payne* [1896] 1 Q.B. 577, 580; *Gaskell and Chambers, Ltd.* v. *Hudson, Dodsworth and Co.* [1936] 2 K.B. 595, 603.

Where contempt is committed in the face of the court immediate action is demanded. The court cannot afford to delay when faced with recalcitrance or objectionable conduct on the part of lawyers, witnesses, parties, spectators and others:

> "There is no doubt that the judge has power to act immediately, without attachment or other process, upon his own knowledge, and to condemn and punish without receiving further evidence than that of his own senses." [24]

This valuable privilege has been entrusted to the judges in order that they may exercise a form of preventive justice. It is a power that is not abused and even the potentiality of abuse could best be guarded against, one suspects, by the provision of the right of appeal and some central control of the decision whether or not to intervene when efforts are made to intimidate a party or a witness.[25]

"Constructive contempt"

More troublesome are the heads of "constructive contempt" under which a court may punish persons responsible for publications or words uttered outside court. It is here that the absence of the normal procedures of a criminal trial gives rise to concern and it is here that there have been many attempts to secure a right of appeal and some central control of the decision whether or not to institute proceedings.

"Judges are supposed," it was declared in the Supreme Court of the United States, "to be men of fortitude, able to thrive in a hardy climate." [26] Nonetheless the judges have power to vindicate themselves, either individually or collectively, in response to some particularly outrageous comment made outside court which is likely to reflect unfavourably upon the administration of justice. Contempt proceedings have arisen as a result of words or printed matter that allegedly ridiculed judges, or accused them of political or other bias, or which in any way tended by unfair criticism to reduce public confidence in the courts of law.[27] The English judges, mindful perhaps of the experience of an American federal judge who was almost impeached for his arbitrariness in such matters,[28] rarely invoke this jurisdiction nowadays and even in the cases that have arisen the punishments imposed have been relatively slight. Some judges would be content to rely upon public opinion and the law of libel as a sufficient safeguard of their dignity[29] while others would confine proceedings in contempt to words and publications that are intemperate and unreasonable.[30]

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[23] See *In the Matter of the Pontefract Election Petition* (1893) 9 T.L.R. 430, 431; *In the Matter of the Wigan Election Petition* (1894) 10 T.L.R. 264, 265; *Fairclough* v. *The Manchester Ship Canal Co.* (1896) 13 T.L.R. 56.

[24] Beale, *supra*, note 14, at 172. See generally—*Ex p. Fernandez* (1861) 4 L.T. 324 (witness refusing to answer a question); *Re Gerson* [1946] Can. Sup.Ct. 538 (witness refusing to answer); *Shamdasani* v. *King-Emperor* [1945] A.C. 264 (P.C.) (insulting conduct of litigant); *Izuora* v. *The Queen* [1953] A.C. 327 (P.C.) (discourtesy of barrister). During the Second Reading debate of the Administration of Justice Bill, the judges in the House of Lords gave several instances of more unusual cases of contempt (hurling brickbats, eggs, tomatoes, etc., at the judges): see 222 H.L. Deb. 270, 273, 277–278, 279–280 (March 24, 1960).

[25] See Goodhart, *supra*, note 16, at 895–898; *Archbold* (34th ed., 1959), 3451 at p. 1300.

[26] *Craig* v. *Harney* (1947) 331 U.S. 367, 376. See also *Ambard* v. *Att.-Gen. for Trinidad and Tobago* [1936] A.C. 322, 335 (P.C.).

Publications relating to pending cases

A jurisdiction that has achieved prominence for some two hundred years is the power to punish prejudicial publications relating to pending proceedings. There are cases arising from speeches, sermons, theatrical performances and cinema newsreels,[31] but in general they concern newspapers and periodicals. The proprietors, publishers, editors, correspondents, contributors, printers and distributors of newspapers and periodicals of all kinds have to reconcile themselves to the occupational risk of committing a crime that involves an all-embracing vicarious liability,[32] the absence of a defence related to intention,[33] and—on occasion—severe punishment.[34] The scope of the crime is quite uncertain both as to the type of comment that merits censure[35] and as to the extent of the quarantine period during which no prejudicial matter is tolerated.[36] There already exist certain specific statutory restrictions of the right to publish matter relating to judicial proceedings,[37] but, from the standpoint of the Press, there is no more effective censor than an uncertain law.

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[27] See *R.* v. *Castro* (1873) L.R. 9 Q.B. 219; *Re A Special Reference from the Bahama Islands* [1893] A.C. 138 (P.C.); *McLeod* v. *St. Aubyn* [1899] A.C. 549 (P.C.); *R.* v. *Gray* [1900] 2 Q.B. 36; *R.* v. *Nicholls* [1911] 12 Comm. L.R. 280; *R.* v. *Editor of New Statesman* (1928) 44 T.L.R. 301; *R.* v. *Colsey, The Times*, May 9, 1931; *R.* v. *Fletcher* (1935) 52 Comm.L.R. 248; *R.* v. *Dunbabin* (1935) 53 Comm.L.R. 434; *Ambard* v. *Att.-Gen., supra*, note 26.

[28] See Frankfurter and Landis, *supra*, note 21, at 1024 *et seq.*

[29] *McLeod* v. *St. Aubyn, supra*, note 27, at 561; *Att.-Gen.* v. *Blomfield* [1914] N.Z.L.R. 545; Hughes, "Contempt of Court and the Press" (1900) 16 L.Q.R. 292, 293.

[30] *Att.-Gen.* v. *Butler* [1953] N.Z.L.R. 944, 946.

[31] See *R.* v. *Castro, supra*, note 27; *R.* v. *Williams* (1823) 2 L.J.(o.s.)K.B. 30; Note, (1896) 10 Harv.L.R. 176; *R.* v. *Hutchinson* [1936] 2 All E.R. 1514.

[32] *R.* v. *Evening Standard Co., Ltd.* [1954] 1 Q.B. 578, 585–586.

[33] *R.* v. *Odhams Press* [1957] 1 Q.B. 73, 80; *Att.-Gen.* v. *Noonan* [1956] N.Z.L.R. 1021, 1026.

[34] *Higgins* v. *Richards* (1912) 28 T.L.R. 202; *R.* v. *Bolam; ex p. Haigh* (1949) S.J. 220.

"The last thing we want in this country," said Viscount Kilmuir in moving the second reading of the Administration of Justice Bill, "is trial by newspaper."[38] The English courts have, to an extent that astonishes some foreign observers, sought to shield jurymen in particular from the danger of reading anything that might tend to sway their verdict, and have also been prepared to protect inferior courts[39] and the superior court judges themselves from any suggestion of similar improper pressure. Few would quarrel with this determination to restrict prejudicial comment and few would deny that in such a variable field as this the law needs to be flexible. Flexibility is one thing, but it is not enough to argue simply—and this is done all too often where policy impinges upon law—that each case depends upon its own facts. The many reported decisions on newspaper contempt tend, on examination, to reveal "a dominant reluctance"[40] on the part of the courts to exercise their extraordinary jurisdiction in contempt and a consequent readiness to distinguish between what may be called *technical* and *serious* contempts. Broadly, and allowing for differences in terminology, the authorities suggest that while a publication referring to a pending case is technically a contempt if it has a tendency to influence the result, yet the court will not exercise its summary power of interference unless the publication is also likely or calculated to affect the result.[41] In other words the courts often adhere to a standard akin to the "clear and present danger" test applied in the United States.[42] The English decisions also suggest that, once the likelihood of prejudice has been established, then other factors—such as wilfulness [43] and the circulation figures of a particular publication [44]—could be considered in the assessment of the penalty.

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[35] See *Re Labouchere* (1901) 17 T.L.R. 578, 579; *R.* v. *Duffy*; *ex p. Nash* [1960] 2 Q.B. 188, 197–198.

[36] For alleged contempt after conviction or judgment, see *Metzler* v. *Gounod* (1874) 30 L.T. 264; *Dallas* v. *Ledger* (1888) 4 T.L.R. 432; *Dunn* v. *Bevan* [1922] 1 Ch. 276; *Att.-Gen.* v. *Tonks* [1939] N.Z.L.R. 533; *R.* v. *Davies* [1945] 1 K.B. 435; *Att.-Gen.* v. *Crisp* [1952] N.Z.L.R. 84; *R.* v. *Duffy*; *ex p. Nash*, *supra*, note 35. For contempt in photograph-identification cases, see *R.* v. *Daily Mirror* [1927] 1 K.B. 845; *Att.-Gen.* v. *Tonks* [1934] N.Z.L.R. 141; *Att.-Gen.* v. *Noonan*, *supra*, note 33; *Stirling v. Associated Newspapers*, 1960 S.L.T. 5; [1960] Crim.L.R. 265. See, generally, *R.* v. *Evening Standard* (1924) 40 T.L.R. 833; *R.* v. *Odhams Press* [1957] 1 Q.B. 73.

[37] *e.g.*, Judicial Proceedings (Regulation of Reports) Act, 1926; Children and Young Persons Act, 1933, s. 49; Magistrates' Courts Act, 1952, s. 58.

[38] 222 H.L. Deb. 253. See Goodhart, *supra*, note 16; Webber, "Trial by Newspaper" (1958) 11 Curr.Leg.Pr. 37; Basta, "Free Press—Fair Trial" (1959) 50 *J.Crim.Law, Criminology and Police Science* 374.

[39] See, as to the protection of inferior courts, *R.* v. *Parke* [1903] 2 K.B. 432; *R.* v. *Davies* [1906] 1 K.B. 32; *R.* v. *Editor of Daily Mail* [1921] 2 K.B. 733; *R.* v. *Daily Herald* [1932] 2 K.B. 402; *Russell on Crime* (11th ed., ed. Turner, 1958), at 348–349.

[40] Frankfurter and Landis, *supra*, note 21, at 1051.

If any standard is to be of value it must be consistently used. Virtually all the English decisions on criminal contempt have been by courts of first instance and the appellate courts have been silent. Those alleged to have committed contempt have been diffident about challenging the allegations lest they prejudice themselves still further. What they would welcome is the formulation of a recognised test, however general, so that they could properly seek to argue that their conduct does not come within its terms. But, in the absence of legislative provision, the successful formulation and continued effectiveness of such a test presuppose a right of appeal.

Section 13 of the Act: appeal in contempt cases

The Administration of Justice Act provides in section 13 for a uniform right of appeal in all cases of contempt, civil and criminal, and from all courts which have power to commit for civil or criminal contempt. Quarter sessions and county courts are unable to punish constructive contempts but they can commit for contempt in the face of the court; and all inferior courts, including magistrates' courts, appear to have certain statutory powers to punish in cases of civil contempt. Appeal under the new legislative scheme may be sought by any defendant, who may be allowed bail while his appeal is pending, and, in the case of an application for committal or attachment, at the instance of the applicant. The scheme is as follows—

(1) Appeal will lie to the Court of Appeal from an order or decision of (a) a county court, acting, for instance, under

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[41] See, esp., *Bell* v. *Stewart* (1920) 28 Comm.L.R. 419, 432; *Hunt* v. *Clarke* (1889) L.J.Q.B. 490, 491, 494; *Carl-Zeiss Stiftung* v. *Rayner and Keeler, Ltd.* [1960] 1 W.L.R. 1145, 1151.

[42] "By this rule the power to punish utterances is limited to instances where the substantive evil that the utterances present is extremely serious and the degree of imminency extremely high"—Note, (1959) 107 Univ. of Pennsylvania L.R. 415, 416.

[43] *R.* v. *Evening Standard* [1954] 1 Q.B. 578; *Yorks Provident Assurance Co.* v. *Gilbert and Rivington* (1894) 11 T.L.R. 143.

[44] *Felkin* v. *Herbert* (1864) 9 L.T. 635, 637; *In the Matter of the Finance Union* (1895) 11 T.L.R. 167, 168.

sections 30, 127 or 157 of the County Courts Act, 1959; (b) any other inferior court from which appeals generally lie to the Court of Appeal and which has power to commit for contempt—this seems to include the Mayor's and City of London Court, the Salford Hundred Court and the Liverpool Court of Passage; (c) the Chancery Courts of the Counties Palatine of Lancaster and Durham; (d) a single judge of the High Court; (e) any court having the powers of the High Court or of a judge of that court—this seems to include Commissioners of Assize, Divorce Commissioners, the Restrictive Practices Court, and the Lord Chancellor and "nominated judges" acting under Part VII of the Mental Health Act, 1959.

(2) Appeal will lie to a Divisional Court of one of the Divisions of the High Court from an order or decision of inferior courts not included above—this seems to include quarter sessions, magistrates' courts (acting under section 54 (3) of the Magistrates' Courts Act, 1952) and such courts as the Bristol Tolzey Court and the Norwich Guildhall Court.

(3) Appeal will lie with the leave of either court direct to the House of Lords from an order or decision of a Divisional Court, of the Court of Appeal, of the Court of Criminal Appeal or of the Courts-Martial Appeal Court. The restrictive criteria which are to apply to ordinary criminal appeals [45] will apply only where the decision of the court below is itself a decision on appeal.

The court which hears appeals in any of the above cases is empowered to reverse or vary the order or decision of the court below and to make such other order as may be just. Difficulties of classification into criminal and civil contempts are for the purpose of appeals circumvented even if not solved, and appeals in civil cases will henceforth be subject in the event of a second appeal to the restrictive criteria that are elsewhere reserved for criminal cases. The Act does not, however, seek to end the basic distinction between the two types of contempt, the one disciplinary and the other criminal. Differences other than that of a right to appeal follow from the classification.[46]

It was contended by judges who took part in the Second Reading debate in the House of Lords that an appeal should not be allowed from a conviction for contempt in the face of the court. Their arguments stressed the need for a court to act quickly to assert itself in the event of such a contempt and that an appeal against its decision would be invidious and unfortunate. Lord Goddard pointed out that a witness who has declined to answer a question is invariably more co-operative after a night in the cells, whereas to allow him an appeal would unnecessarily delay the case in which he was testifying. Yet, to take that situation alone, surely difficult points of law could arise, and whether a witness has in fact refused to answer must sometimes involve a question of degree:

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[45] s. 2 (1).

[46] See Halsbury, *op. cit.*, *supra*, note 15, at 2–49.

> " While it is clear enough that a refusal to answer may be inferred from the giving of what purports to be an answer, the power to commit summarily for a refusal so inferred is a power attended by obvious dangers, and extreme caution is required in its exercise." [47]

If no appeal were allowed from a contempt conviction for refusing to answer a question it would also involve denying the alleged contemnor any of the procedural guarantees to which a perjurer, who has not only in effect refused to answer but has deliberately deceived the court, is entitled. There does not appear to be a convincing reason, either, for refusing an appeal in other cases of contempt in the face of the court, but it might have been appropriate to adopt the suggestion of " Justice " that a court or judge should be empowered to certify such a contempt for trial by another court or judge.[48]

Since cases of constructive contempt are almost invariably heard at first instance by a Divisional Court it is to the House of Lords that we must look for guidance in the future development of the law concerning the control of words and publications outside the courts. Some progress on the substantive side has already been made in the Act which provides in section 11, firstly that a person responsible for publishing prejudicial matter will have an opportunity of proving to the court's satisfaction that he acted with care but without knowledge (actual or constructive) of the fact that proceedings were imminent or pending, and secondly, that a distributor of publications containing prejudicial matter may seek to prove a like standard of absence of knowledge. These changes relate directly to two controversial decisions of 1957.[49]

Section 12 of the Act: proceedings in private

There is an attempt in section 12 to clarify the law of contempt as to proceedings in private, a sphere which the Lord Chancellor in debate has described as "obscure" and which—so far as concerns proceedings in chambers—has elsewhere been described as "chaotic." In future the publication of information relating to proceedings before any court or tribunal sitting in private[50] will not of itself constitute contempt of court except where the proceedings arise in connection with certain matters concerning infants, specified provisions of the Mental Health Act, 1959, questions of national security, details of a secret process or discovery, or information in respect of which the court or tribunal has invoked its legal power to prohibit publication. Unless the court or tribunal exercises its legal power expressly to prohibit publication, the publication of the text or a summary of the whole or part of an order made when it is sitting in private will in no case amount, of itself, to contempt of court. This power to prohibit publication may derive from statute or from the inherent power of a court to prevent such publicity as would defeat the object of the proceedings.[51] Excessive use of such a power will undoubtedly be inhibited by the very existence of an avenue of appeal, and any likelihood of the Act's provisions actually adding to the terrors of contempt in this field is obviated by subsection (4) which provides that no publication shall be punishable as contempt of court under section 12 which would not be punishable apart from the section.

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[47] *Coward* v. *Stapleton* (1953) 90 Comm.L.R. 573, 580; 27 A.L.J. 423.

[48] *Contempt of Court* (1959), at 42. See *In the Matter of Lewis Duncan* [1958] Can.Sup.Ct. 41; *Sunday Pictorial Newspapers, Ltd.* v. *Hive Printers, Ltd., The Times,* January 14, 1961.

[49] *R.* v. *Odhams Press* [1957] 1 Q.B. 73; *R.* v. *Griffiths* [1957] 2 Q.B. 192.

Habeas corpus: the law prior to the Act

"The Habeas Corpus Acts," wrote Dicey in the late nineteenth century, "declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."[52] For centuries, immense trust has been placed in the writ of habeas corpus as an ultimate and effective safeguard of personal liberty. In the past it has been invoked against the King, against the House of Commons, against slave owners, press gangs, possessive husbands and Vice-Chancellors. It is still frequently used to challenge detention or custody under extradition and Fugitive Offenders statutes, under emergency powers in war time and peace time, in connection with mental health and the custody of children, and as a result of alleged irregularities in the normal processes of the criminal law.[53]

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[50] The term "private" refers to a court sitting *in camera* or in chambers: s. 12 (3).

[51] See 222 H.L. Deb. 253–254. An example of a statutory power to prohibit publication is s. 4 (2) of the Defence Contracts Act, 1958.

[52] *Introduction to the Study of the Law of the Constitution* (10th ed., editor E. C. S. Wade, 1959), at 199. See also *Home Secretary* v. *O'Brien* [1923] A.C. 603, 609; *R.* v. *Halliday* [1917] A.C. 260, 295.

[53] *e.g., R.* v. *Governor of Brixton Prison; ex p. Caborn-Waterfield* [1960] 2

That no appeal in general lay from the release of a person on habeas corpus was a well-known proposition of law:

> "I think the law of England to be long settled to the following effect, *i.e.*, that when once a legally constituted court has determined that a subject of the Crown . . . is entitled to his liberty, such a judgment cannot be overruled either by any other court or by any court of review or appeal."[54]

Such a rule ensured speedy release and "finality of liberation",[55] and it was further pointed out that there was in any case no machinery available for giving effect to a successful appeal against discharge upon a writ of habeas corpus.

A refusal of the writ could, save where it concerned a criminal cause or matter, be the subject of an appeal to the Court of Appeal and thence to the House of Lords. The test for determining what was a criminal cause of matter—and this was equally applicable to questions of appeals by case stated and of prerogative orders—is that laid down by Viscount Cave in *Re Clifford and O'Sullivan* [56] and succinctly stated thus by Viscount Simon in *Amand* v. *Home Secretary*:

> "It is the nature and character of the proceeding in which habeas corpus is sought which provides the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do si, the matter is criminal." [57]

Since the courts consistently felt obliged to give the widest possible interpretation to "a criminal cause or matter" and since most applications tend to fall within Viscount Cave's definition, it is not surprising that the number of habeas corpus appeals heard in the last eighty or so years has been relatively small. It should be remembered that this restriction by classification on the right of appeal dated from a time when there was no Court of Criminal

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W.L.R. 792 (extradition); *R.* v. *Governor of Brixton Prison*; *ex p. Shuter* [1960] 2 Q.B. 89 (Fugitive Offenders Act, 1881); *Liversidge* v. *Anderson* [1942] A.C. 206 (emergency powers in wartime); *Ex p. Mwenya* [1959] 3 W.L.R. 509, 767 (emergency powers in peacetime); *R.* v. *Board of Control*; *ex p. Rutty* [1956] 2 Q.B. 109 (mental health); *Re A.B.* [1954] 2 Q.B. 385 (custody of child); *Ex p. Thomas* [1956] Crim.L.R. 119 (criminal law—excessive bail).

[54] *Home Secretary* v. *O'Brien* [1923] A.C. 603, 643. See also *ibid.*, at 609–610, 621; *Cox* v. *Hakes* (1890) 15 App.Cas. 506; *Amand* v. *Home Secretary* [1943] A.C. 147, 155–156. The general rule does not apply in cases involving the custody or care of children: *Barnardo* v. *McHugh* [1891] A.C. 388; *Barnardo* v. *Ford* [1892] A.C. 326; *Home Secretary* v. *O'Brien, supra,* at 613.

[55] *Home Secretary* v. *O'Brien, supra,* at 645.

[56] [1921] 2 A.C. 570, 580. This was a prohibition application.

[57] [1943] A.C. 147, 156.

Appeal and when it was felt that criminal matters should be dealt with from first to last by persons conversant with criminal law.[58] It was and is believed, with what justification it is difficult to say, that the determination of questions of criminal law—even when decently subdued in the guise of an apparently civil action—is not for the rarified atmosphere of the Court of Appeal.

Lawyers, and especially students of constitutional law, have in the past consoled themselves somewhat vaguely with the thought that, even if there was no right of appeal in criminal cases, then at least an unsuccessful applicant for a writ of habeas corpus was entitled to move from court to court (of equal standing) and from judge to judge arguing anew his case for release.[59] It is perhaps as well that the involved forensic struggles of one person in the last few years have destroyed what has been called the " illusion " or the " cherished legend " of the right to make successive applications.[60] Edward Thomas Hastings, who had been convicted on five counts at Liverpool Crown Court and sentenced to four years' corrective training, appealed to the Court of Criminal Appeal as a result of which one of the counts (the only one for felony) was quashed. The sentence remained unaltered and Hastings applied to a Divisional Court of the Queen's Bench Division for a writ of habeas corpus on the ground that his sentence was now unlawful in that it properly related only to the five counts as a whole. From a refusal of the application he appealed to the Court of Appeal which declined jurisdiction in what was clearly a criminal cause or matter, so a new application was made to another Divisional Court of the Queen's Bench Division. Again the application failed, this time on the ground that the decision of one Divisional Court was deemed conclusive so far as any others of that Division were concerned. Hastings next applied to a hastily-contrived Divisional Court of the Chancery Division, and from its refusal to allow a rehearing he finally appealed to the Court of Appeal which for the second time would not intervene in an essentially criminal cause. The efforts of one applicant had ended in failure but the moral was clear. " The case," said Lord Parker, " is just the case in which a ruling by the highest tribunal in the land is required."[61]

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[58] See *Ex p. Alice Woodhall* (1888) 20 Q.B.D. 832; *R.* v. *Governor of Brixton Prison*; *ex p. Savarkar* [1910] 2 K.B. 1056; *R.* v. *Governor of Brixton Prison*; *ex p. De Demko* [1959] 1 Q.B. 268; affirmed on appeal *sub nom. De Demko* v. *Home Secretary* [1959] A.C. 654.

[59] *Home Secretary* v. *O'Brien* [1923] A.C. 603, 610; *Eshugbayi Eleko* v. *Govt. of Nigeria* [1928] A.C. 459; *Ex p. Chapple* (1950) 66 T.L.R.(Pt .2) 932.

[60] *Re Hastings* [1958] 1 W.L.R. 372 (D.C.); *The Times*, July 29, 1958 (C.A.); [1958] Crim.L.R. 687; *Re Hastings* (*No. 2*) [1959] 1 Q.B. 358 (D.C.); *Re Hastings* (*No. 3*) [1959] 1 Ch. 368 (D.C.); [1959] 3 All E.R. 221 (C.A.). See, generally, Heuston, " Habeas Corpus Procedure " (1950) 66 L.Q.R. 79; Lord Goddard, " A Note on Habeas Corpus " (1949) 65 L.Q.R. 30; Qasem, " Habeas Corpus Appeals " (1952) 15 M.L.R. 55.

Sections 14 and 15 of the Act

The new Act, in section 14, confirms and extends the Hastings decisions by providing that once a habeas corpus application of a civil or criminal nature has been made by or in respect of any person such application shall not again be made to the same court or judge or to any other court or judge except in the event of fresh evidence being adduced in support of the application. Application may be made in the first instance either to a Divisional Court or to any single judge with the exception of the Lord Chancellor. A single judge, however, who hears a criminal application for habeas corpus will have power only to order the release of the person detained; if he is not prepared to grant such an order the application has to be referred to a Divisional Court of the Queen's Bench Division.

Section 15 of the Act completes a change of emphasis from the horizontal to the vertical by creating a new system of appeals in habeas corpus cases:

(1) an appeal to the Court of Appeal against an order for release and against the refusal of such an order will lie in any civil application;

(2) an appeal, which will not be subject to the restrictive criteria that are to apply to ordinary criminal appeals, will lie direct to the House of Lords from a decision of a Divisional Court of the Queen's Bench Division in a criminal cause or matter;

(3) an appeal will not lie from an order made by a single judge on a criminal application for habeas corpus.

The right to make successive applications in criminal cases is, then, not the only long-cherished principle of English law that is to disappear. Another is the principle of " finality of liberation." In civil as well as criminal cases an order for release, save where children were concerned, has hitherto been final. Such a rule has not been an unmixed blessing and the desirability is now recognised of affording to a person who opposes an application for habeas corpus the opportunity in a proper case of seeking the views of an appellate court. At the same time this is pre-eminently a sphere where the courts should be none too ready to grant leave to appeal in those circumstances.

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[61] [1959] 1 Q.B. 358, 378. It should be noted that the Court of Appeal has rejected an original jurisdiction in habeas corpus: *Ex p. Le Gros* (1914) 30 T.L.R. 249; *Re Carroll* [1931] 1 K.B. 104. The Court of Appeal does have an original jurisdiction under ss. 10 and 39 of the Fugitive Offenders Act, 1881. See *De Demko* v. *Home Secretary* [1959] A.C. 654.

A person released on a civil application for habeas corpus will not be liable to be detained again even if there is an adverse decision upon appeal. Less fortunate is the person detained in criminal proceedings who may, while an appeal is pending, have to remain in custody or be released only upon bail; the court does, however, retain a right to release him without any conditions and he is then entitled to remain at liberty regardless of the judgment of the House of Lords. Irrespective of the merits of a provision which can lead to a successful applicant's continued detention, it is unfortunate that his liability in this respect depends upon the artificial classification between civil and criminal causes. The Act does nothing to aid that classification other than to provide that applications brought by or on behalf of persons detained under the Mental Health Act, 1959,[62] pursuant to orders made by the criminal courts on a prosecution, shall be deemed to be criminal. It would have been more reasonable either not to have allowed re-detention as a result of appeal (which would have been an act of faith) or to have allowed re-detention in all cases and then leave it to the courts to exercise their discretion according to the circumstances.

Another puzzling provision is that which allows no appeal at all from an order for release granted by a single judge in criminal proceedings. The Attorney-General has explained that " it is clear from the structure of the Bill that a single judge will grant the writ only in a case where it is both plainly and undisputably right that the writ should issue and that it should issue at once."[63] It is not apparent to the writer that the structure of the Act is so clear, and it also seems that an appreciation of what is right and an assessment of what is urgent might vary considerably from judge to judge. Even if we accept that the writ were issued in a case of urgency, is there any reason why there should not be an opportunity of appealing against its issue? The new Act is surely lacking in precision here.

Application to Northern Ireland and Scotland

The Administration of Justice Act is, with modifications, extended to Northern Ireland under the provisions of section 18 and the Second Schedule. Except in so far as it relates to appeals from the Courts-Martial Appeal Court, the Act does not extend to Scotland.

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[62] Except persons detained under paras. (*e*) or (*f*) of s. 73 (2) of the 1959 Act.

[63] H.C. Standing Committee A (Administration of Justice Bill), 2nd Sitting, July 14, 1960, at 79.

Prison, Probation and Compensation—R. v. McCarthy[1]

By R. W. J. NORTON

The case of *R.* v. *McCarthy*[2] raises some points that are difficult to reconcile with the procedure laid down in the Criminal Justice Act, 1948, and the Magistrates' Courts Act, 1952.

The circumstances leading to this appellant's appearance before the Court of Criminal Appeal are, according to the report:

(1) McCarthy pleaded guilty at Old Street Magistrates' Court of obtaining money by false pretences and of an attempt so to obtain money;
(2) having been convicted of these offences he was committed to London Sessions for sentence;
(3) at the London Sessions the Chairman imposed two concurrent sentences of 18 months' imprisonment;
(4) "at the same time" the Chairman sentenced McCarthy to 7 days' imprisonment concurrently for the breach of a probation order made for a term of three years by the Hampshire Justices sitting at Whitehill in 1958;
(5) the Whitehill Court Register recorded the fact that in addition to the Probation Order restitution of £100 had been ordered together with payment of costs;
(6) McCarthy appealed against both the sentences of 18 months' imprisonment and of 7 days for breach of probation;
(7) leave to appeal had been given because of the sentence of 7 days' imprisonment and its effect on the order for restitution.

In stating the judgment of the court the report states that the sentences of 18 months' imprisonment would not be interfered with and continues on the point of the seven days' sentence for breach of probation:

"The order had been for three years' probation and there was entered in the Register the fact that restitution of £100 had been ordered together with the payment of costs. What was the effect of the seven days' imprisonment on that order for restitution? Was it in fact restitution which could be ordered under section 47 of the Larceny Act, 1916, whatever sentence had been imposed, or was it compensation ordered under section 11 (2) of the Criminal Justice Act, 1948? It had been conceded that in fact it was the latter and that clearly seemed to be the case, because it was to be observed that the amount was £100 the maximum which could be imposed by section 11 (2) of the Act of 1948.

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[1] See the note on this article in the Editorial, above, p. 73.

[2] *The Times*, October 26, 1960.

" Section 11 (2) provided: ' A court, on making a probation order or an order for conditional discharge or on discharging an offender absolutely . . . may . . . order the offender to pay such damages for injury or compensation for loss as the court thinks reasonable. . . .' Pausing there it was quite clear that an order for compensation could only be made on the making of a probation order or the granting of an absolute or conditional discharge. It could not be made on imposing a term of imprisonment or any other order. What had happened was that on the breach of the probation order the appellant had been sentenced for his original offence. The powers of the court were to be found in section 6 (3) of the Act which provided: ' If it is proved to the satisfaction of the court before which a probationer appears . . . that the probationer has failed to comply with any of the requirements of the probation order, that court may without prejudice to the continuance of the probation order, impose on him a fine not exceeding £10 or . . . (*a*) if the probation order was made by a court of summary jurisdiction, deal with the probationer, for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if it had just convicted him of that offence."

" That had left it open to the Chairman either to have continued the probation order and to have imposed a fine not exceeding £10 or to have dealt with the appellant by sentencing him to imprisonment. In fact a sentence of seven days' imprisonment had been passed with no compensation order attached. It was clear that as a result the order for compensation, in so far as it had not been complied with, ceased to have any effect. An order for compensation could not be attached to a sentence of imprisonment. It was fair to say that the learned Chairman had not had this point in mind and it had never arisen for decision in this court before. The proper order to make was to set aside the sentence of seven days and impose a fine of 20s. The probation order would remain in force and so would the order for compensation. The appellant had expressed his willingness to comply with it as soon as he was able and it was only right in the interests of the people to whom the compensation had been awarded."

The points which arise from this judgment are: (1) McCarthy must have been committed to London Sessions under section 29 of the Magistrates' Courts Act, 1952, to be dealt with for the false pretences offences. Under section 8 (6) of the Criminal Justice Act, 1948, it would be proper for the London Sessions (after dealing with those offences) to have imposed any sentence which a court of summary jurisdiction could have imposed for the offence for which the probation order was made, because the prisoner was then a person who had been dealt with by a court of quarter sessions for an offence committed during the probation period. In the judgment, however, the powers exercised by the London Sessions in imposing a sentence of seven days' imprisonment are attributed to section 6 (3) of the Act. Now section 6 (3) relates to the breach of the requirements of a probation order and not to circumstances related to the commission of a further offence whilst on probation: This clearly appears from the last sentences of section 6 (6): "... a probationer who is convicted of an offence committed during the probation period shall not on that account be liable to be dealt with under this section for failing to comply with any requirement of the probation order."

Upon failure to observe a requirement of a probation order the appropriate court of summary jurisdiction may follow three courses (i) impose a fine not exceeding £10; (ii) order the probationer to attend at an attendance centre; (iii) deal with the probationer for the offence for which the probation order was made in any manner in which the court could deal with him if it had just convicted him of that offence.

These three courses in the *McCarthy* case could only have been used by the Whitehill Magistrates' Court, or the supervising court, those being the courts upon which jurisdiction to take such proceedings is conferred by section 6 (2) (*a*).

Had the Whitehill Magistrates' Court acted upon (iii), one of the possible ways of dealing with him would have been by committal in custody to quarter sessions for sentence under section 29 of the Magistrates' Courts Act, 1952, or if he were of Borstal age, under section 28 of that Act. (It is assumed that the probation order related to an indictable offence otherwise section 47 of the Larceny Act, 1916, considered in the judgment as an alternative justification for ordering restitution would not have applied.) Such a committal, however, would have been to the quarter sessions having jurisdiction in the county for which the Whitehill Magistrates' Court acts, namely, Hampshire Quarter Sessions.

(2) The report does not indicate in what manner McCarthy failed to observe the requirements of his probation order, but it appears from the above argument that on the *breach of a requirement* he could not properly have appeared before the London Sessions at all, unless the Old Street Magistrates' Court had become the supervising court.

Could his failure to pay the £100 compensation be considered a breach of the requirements? It is submitted that this could not be so because in the proviso to section 3 (3) of the Criminal Justice Act an order made under section 11 (2) of the Act for the payment of compensation shall not be included among the requirements of a probation order. If an order for the payment of compensation is to be enforced it must be done, under section 11 (3) in like manner as an order for the payment of costs by the offender.

It is true that an order for the payment of compensation can only be made if the offender is placed on probation or conditionally discharged, or on absolute discharge, but distinct procedures are enacted (i) for dealing with the failure to observe the requirements of the order, (ii) for enforcing the order to pay compensation, and (iii) for sentencing the probationer who has committed a further offence whilst on probation.

It would appear that the proviso to section 3 (3) of the Criminal Justice Act, 1948, which excludes from the requirements of a probation order any order for the payment of sums by way of damages for injury or compensation for loss was designed especially to meet the possibility of a probation order being terminated before compensation had been paid either by lapse of time or by subsequent sentence for the original offence.

Practice and Procedure

Administration of Justice Act, 1960

Operative date

In R. *v.* HOLMES (Court of Criminal Appeal: Lord Parker C.J., Streatfeild and Elwes JJ.: November 28, 1960)[1] the facts were that H. was convicted of rape in 1955. His application for leave to appeal against conviction was subsequently refused. His application for leave to appeal against sentence was granted and on the hearing, his sentence was increased. He now applied to the Court of Criminal Appeal for leave to appeal out of time to the House of Lords under the provisions of the Administration of Justice Act, 1960.

Held, dismissing the application, that the application was entirely misconceived. The Act of 1960, which came into force on October 27, 1960, could only apply to decisions of this court heard after that date. The matter was being mentioned in open court because a number of prisoners apparently thought that they could now apply for leave to appeal to the House of Lords whenever they had been convicted and sentenced. [H. P.]

Practice Note

Breach of order for conditional discharge—when to be dealt with

In R. *v.* WHITEHEAD (Court of Criminal Appeal: Lord Parker C.J., Streatfeild and Nield JJ.: November 21, 1960) the facts were that the appellant was convicted of larceny by a magistrates' court and, after committal for sentence, was sentenced by quarter sessions to borstal training. The conviction also constituted a breach of a conditional discharge previously imposed by the magistrates, and the magistrates, in committing the appellant for sentence, expressly adjourned *sine die* the question of the breach of the order for conditional discharge. The breach of the order for conditional discharge was not dealt with by the court when sentencing the appellant to borstal training. Streatfeild J., giving the judgment of the Court of Criminal Appeal, said that the result of the procedure adopted would be that the appellant would have to be taken back to the justices while undergoing borstal training. This was both wasteful and undesirable. Moreover, that procedure was contrary to the decisions of this court in *R.* v. *Webb*, 37 Cr.App.R. 82 and *R.* v. *Fry*, 38 Cr.App.R. 157. This court would, therefore, impose a nominal sentence of one day's imprisonment for the breach of the order for conditional discharge. The object of the nominal sentence for the offence was so that that offence would hereafter rank as a conviction. [H. P.]

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[1] The applicant did not appear and was not represented.

Commentary. One of the effects of section 12 (1) of the Criminal Justice Act, 1948, is that a conviction resulting in an order of probation or conditional discharge cannot rank as a conviction for the purpose of imposing thereafter a sentence of preventive detention or corrective training unless, by reason of a subsequent offence, a sentence is imposed for the earlier one. It is not enough for the sentencing court to " take into consideration " the breach of the probation order or of the conditional discharge in imposing the sentence for the subsequent offence. A sentence which takes into consideration other offences is still, in law, passed only for the offence with which the court is actually dealing. While there may be cases in which a court would think fit to make the sentences for the original and subsequent offences concurrent, it seems desirable that this power should be used only exceptionally. It is important that offenders should realise that discharge on probation or conditionally is not a mere formality and that a subsequent offence, during the operation of the order, will involve punishment for the original crime: *R.* v. *Webb*, above. [J. C. S.]

*Case and Comment**

EVIDENCE

Burden of proof—jury not directed on this in judge's summing-up

R. v. Oliva

Court of Criminal Appeal: Lord Parker C.J., Streatfeild and Nield JJ.: November 22, 1960.[1]

O. was convicted at the Central Criminal Court of assault occasioning actual bodily harm. The facts were that one W. was approached by a woman in a Soho street and was invited into a "near beer" house. W. went in and, during the course of the evening, paid over two £5 notes for soft drinks; on neither occasion did he receive any change and, when he complained about this, the woman fetched some men (one of whom was O.) who, according to W., set upon him, pushed him into the street and kicked and punched him. O. appealed to the Court of Criminal Appeal against his conviction on the ground that there had been no proper or sufficient direction to the jury as to the burden of proof.

Held, allowing the appeal, that it was a cardinal principle of our law that it was for the prosecution to prove the prisoner's guilt. It was also a cardinal principle that the jury must be told to apply certain standards, namely, that they must be "sure" of the prisoner's guilt or "satisfied beyond reasonable doubt." So far as the second principle was concerned, the judge, in passage after passage, said that the jury must be sure of O.'s guilt before convicting him. There was, however, no passage in which the judge used words to show that it was for the prosecution to prove their case, or words to the effect that the burden of proof was on the prosecution. The question of where the burden of proof lay was not in this case very material; the issue being whether W. and a police officer were to be believed or whether O. was to be believed. Nevertheless, it had become almost a rule of law that the jury should be directed in every case that the burden of proof was on the prosecution and that principle had to be re-asserted in this case. It might be that the appellant was a very lucky man indeed, but the principle in issue was so important that this court had no option but to quash the conviction. [H. P.]

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: *B. Gillis, Q.C.,* and *S. Lincoln* (instructed by Messrs. Miles, Russell & Co.). For the Crown: *W. M. Howard* (instructed by the Solicitor, Metropolitan Police).

Commentary. ". . . the jury should be directed first, that the onus is always on the prosecution; secondly, that before they convict they must feel sure of the accused's guilt. If that is done, that will be enough": *R.* v. *Hepworth and Fearnley* [1955] 2 Q.B. 600, *per* Goddard L.C.J.

The quashing of the conviction in the particular circumstances of this case may seem to have been unnecessary, but "Many cases could be cited of a conviction that has been quashed in the case of a man who is obviously guilty simply because a rule that is necessary for the good administration of justice has been infringed": Devlin J., *The Criminal Prosecution in England*, 37. See also *R.* v. *McKenna* [1960] 1 Q.B. 411 where the Court of Criminal Appeal quashed convictions although the "evidence against all three appellants was cogent to a degree." "Plain though many juries may have thought this case, the principle at stake is more important than the case itself."

Such a result emphasises how unfortunate it is that the Court of Criminal Appeal lacks the power to order a new trial: a man whose guilt may be clear beyond any reasonable doubt may go entirely free because of a slight slip by a judge in his summing up or in the admission of evidence.

It is not entirely clear why the good administration of justice in such cases cannot frequently be vindicated by the decision of the point in favour of the appellant and the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

EXTRADITION

Extradition Act, 1870, s. 10—distinction between a person "accused" of an extradition crime and a person "convicted" of an extradition crime

R. v. Governor of Brixton Prison; ex p. Caborn-Waterfield

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Salmon JJ.: [1960] 2 W.L.R. 792.[2]

C., who, in January 1954, had been summoned to appear before a French criminal court to answer a charge of theft did not appear, and, in his absence, was convicted and sentenced to four years' imprisonment. Such a conviction was known, in French law, as a "*jugement par défaut,*" and anyone who was subject to such a conviction had the right at any time, on notice, to have it set aside and the case retried in his presence. In June 1956 C. gave the requisite notice; but at the rehearing he again failed to appear, and the court, in accordance with French law, confirmed the conviction and sentence by a "*jugement itératif défaut*" which judgment, unless notice of appeal were given within ten days, became final and conclusive. No such notice of appeal was given.

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[2] For C.: *F. H. Lawton, Q.C.*, and *Michael Sherrard* (instructed by Messrs. Blacket, Gill & Prior). For the Home Secretary: *Sir Reginald Manningham-Buller, Q.C., A.-G.*, *J. R. Cumming-Bruce* and *R. A. Barr* (instructed by the Treasury Solicitor). For the Governor of Brixton Prison: *J. H. Buzzard* (instructed by the Director of Public Prosecutions). For the French Government: *Michael Koenig* (instructed by Messrs. Rowe & Maw).

In January 1960 C. was arrested in England on a warrant issued under the Extradition Act, 1870. The warrant stated that the requisition had been made by the French Government for his surrender as "suspected and accused of the commission of the crime of larceny." The magistrate committed him for extradition on that basis.

C. applied for a writ of habeas corpus on the ground that the basis of the requisition and committal were false in law, since, being subject to a "*jugement itératif défaut*" he would, if surrendered, have gone straight to prison to serve his sentence without further trial.

Held, allowing the application, that a person who was subject to a "*jugement itératif défaut*" was a person "convicted of an extradition crime" within the second paragraph of section 10 of the Extradition Act, 1870, and not a person "accused" within the meaning of the section; and that C.'s committal as an "accused" person was, accordingly, wrong in law.

Quaere, whether, in proceedings under the Extradition Act, 1870, the English courts were bound to commit on proof of a conviction, or whether they might inquire into the foreign proceedings and might refuse to commit if the foreign judgment offended against English notions of substantial justice. [D. C.]

Commentary. It is, of course, implicit in the judgment that the applicant was liable to extradition under the second paragraph of section 10, and he was subsequently extradited.

Since there was no question of the applicant being tried if he was surrendered, the court held that it was "plain beyond argument" that he was a person "convicted of an extradition crime" and not a person "accused of an extradition crime," within the literal meaning of those expressions. Reliance was, however, placed by the respondents on the interpretation section (26) of the Act which provides that the words "accused person" include, and the words "convicted person" do not include, a person convicted "for contumacy." If, therefore, the applicant had been convicted "for contumacy" he was an accused, and not a convicted person within the meaning of the Act, and was rightly committed. The issue was, then, whether a "*jugement itératif défaut*" was a judgment for contumacy.

It appears that the words "for contumacy" are intended as a translation of the French "*par contumace*" and that where a person is convicted "*par contumace*" and is subsequently apprehended, the judgment is annulled and he is put upon his trial. It was, therefore, held in *Re Coppin* (1866) 2 Ch.App.Cas. 47 that a person convicted *par contumace* was properly described as an accused person. In the opinion of the court, the words "for contumacy" were introduced into section 26 of the Act of 1870 in order to bring that statute into line with the decision in *Re Coppin.*

A judgment "*itératif défaut*" is therefore radically different in character from a conviction "*par contumace.*" A conviction "*par défaut*" (not referred to in the Act), on the other hand, would appear to be of the same character as a conviction "*par contumace*," and a person convicted "*par défaut*," it would appear, would properly be dealt with as an accused, and not as a convicted person.

The practical importance of this distinction between the two paragraphs of section 10 is that, in the case of the first, the evidence must prove that the prisoner *committed* the crime of which he is accused, whereas, in the case of the second, it need only prove that he was *convicted* of the crime in question.

HABEAS CORPUS

Extradition

See R. *v.* GOVERNOR OF BRIXTON PRISON; *ex p.* CABORN-WATERFIELD, p. 112, *ante.*

HOMICIDE

Manslaughter—causing death by administering household cleansing liquid—recklessness

R. v. Pike

Surrey Assizes at Kingston: Finnemore J.: November 17, 18, 1960.[3]

P., a gas meter collector, was charged with the manslaughter of his mistress. He had evolved the practice of giving her Carbon Tetrachloride soaked on a rag to inhale before intercourse. This had an anaesthetising effect which had, on a former occasion, rendered her completely unconscious. He had also done this to other women over a period of years with no apparent ill-effects save temporary loss of consciousness. C.T.C. can be freely obtained and is also the basis of certain proprietary brands of household cleansers in common use. The only warning which such a bottle of cleanser exhibits is that it is not to be used in confined spaces.

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[3] For the Crown: *Owen Stable* (instructed by the Director of Public Prosecutions). For the defendant: *F. Lawton, Q.C.*, and *J. S. R. Abdela* (instructed by Tillbrook, Hunt and Lock, Woking, Surrey).

It was alleged that on this occasion he put the cloth over the deceased's mouth. In a statement to the police he said that after she had undressed she had administered the C.T.C. to herself and that when he approached her she was already lying dead with the soaked cloth over her mouth and nostrils.

Finnemore J. directed the jury that they should be satisfied on three points:

1. That the C.T.C. caused the death, and
2. That the accused administered the anaesthetic, and
3. That he was reckless in doing so.

As to the first point, medical evidence showed that the only positive findings on the body were (a) a persistent thymus gland which renders a person more susceptible to death by shock, and (b) a cyanosis of the skin. The suggestion by the medical witnesses was that she had died from vagal shock caused by over-stimulation of the vagus nerve due to the inhalation of the C.T.C. It was, however, admitted that the blue condition of the skin was inconsistent with death due to vagal shock where there is normally a skin pallor. Such cyanosis was more consistent with death from respiratory failure. Moreover, it was also admitted that vagal shock could result from causes other than the inhaling of an irritant, *e.g.*, it could result from sudden emotion. Finally, it was conceded that in view of the negative findings there could be no certainty that she had died from vagal shock.

The incriminating evidence on the second part of the direction consisted only of equivocal statements of the accused and evidence as to previous practice with another woman three years before.

The question of recklessness was put by the prosecution on the basis that his knowledge that the C.T.C. had in the past made people unconscious showed knowledge of its dangerous qualities and that he was therefore reckless in using it as he did. But this same factor was utilised by the defence who said that the fact that it had made women unconscious before with no ill effects showed that he did not apprehend any danger. Moreover, C.T.C. in the guise of "Thawpit" is a common household cleanser attached to which is no special warning.

On these directions the jury failed to agree and a new trial was ordered.

Re-trial; Lewes Assizes: Hilbery J.: December 19, 20, 1960.

On retrial a new fact emerged on the medical evidence, *viz*., that the opinion of the pathologist as to the cause of death was reached before knowledge of the attendant circumstances. It followed, therefore, that his conclusion that death was due to vagal shock was given greater weight by the court than at the first trial.

Hilbery J. also put three questions to the jury, but two of these indicated a very much wider scope to the felony of manslaughter than had been accepted by Finnemore J.

The jury were asked the following questions:

(1) Did P. administer the C.T.C., or, on the occasion on which she died were they both acting in a common design that she should take it, he providing and her taking it, so that he should equally share with her the responsibility of her taking it? This is a much broader test than that propounded by Finnemore J.

(2) Did the deceased woman die as a result of taking the C.T.C.?

(3) Did P. know that inhaling it would expose her to the danger of physical harm and yet recklessly cause or allow her to inhale it? He particularised this a little more by saying that P. must have acted recklessly, without really caring for what the prejudicial results might be to her, and must have been following his own perverted desires in allowing her to inhale it.

On this point the jury were directed that they were entitled to take into account, in leading them to a finding of recklessness, the fact that P. knew that on past occasions C.T.C. had rendered people unconscious, " for any anaesthesia is a step on the way to death." P. was convicted of manslaughter.

[R. E. AULD, *Barrister-at-Law*.]

Commentary. The direction on both trials seems to have been favourable to P. in that it instructed the jury to apply a subjective test. The questions they were asked to answer were whether P. was reckless and whether *he* knew that inhaling C.T.C. would expose the deceased to physical harm and this is emphasised by the fact that both sides—in the first trial, at least—relied on P.'s previous experiences with C.T.C. There is, in fact, a good deal of authority for saying that manslaughter can be committed by inadvertent negligence: Glanville Williams, *The Criminal Law*, s. 29, and cases considered therein. The test, according to these authorities, should have been whether a reasonable man would have foreseen a grave risk of injury to the deceased.

These directions emphasise the anomalous nature of the rule laid down for murder trials in *D. P. P.* v. *Smith* [1960] 3 W.L.R. 546 to the effect that where the accused unlawfully and voluntarily does something to someone, which causes death, " it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all . . . the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result." In the present case it would seem that the administration was an unlawful act and, indeed, probably a felony under section 23 of the

Offences against the Person Act, 1861, as an unlawful and malicious administration of a noxious thing so as to endanger life: *cf. Tulley* v. *Corrie* (1867) 10 Cox 640, and [1957] Crim.L.R. 327. It was certainly a voluntary act, and the reasonable man might have been expected to know that a substance which caused loss of consciousness was likely to cause death or grievous bodily harm. It is thus not absolutely clear that this was not murder within the rule laid down in *Smith*, though it is, of course, most unlikely and most undesirable that a prosecution for murder would be brought in circumstances like these, where the deceased was a consenting party. This merely shows that the rule is an extravagant one.

The case might also have been treated as one of constructive manslaughter. Death caused in the course or furtherance of a felony is no longer, as such, murder, but it is highly unlikely that the effect of the abolition of the constructive murder rule has converted such killings into prima facie lawful homicides and it is conceived that the rule is that they are still manslaughter. Moreover, the case would seem to come within the doctrine of *R.* v. *Larkin* [1943] K.B. 174 where it was laid down that killing in the course of an unlawful and dangerous act was manslaughter, whether the accused foresaw the possibility of any harm whatsoever to anyone.

It may be, however, that the view of the court was that the administration was not an unlawful act (*i.e.*, no crime apart from manslaughter), perhaps because the deceased consented and, in that event, the test according to *Larkin* was whether there was a very high degree of negligence. *Cf. R.* v. *Cashmore* [1959] Crim.L.R. 850.

LARCENY

Distinction between larceny by a trick and obtaining by false pretences—effect of selecting the wrong charge

R. v. Caslin

Court of Criminal Appeal: Lord Parker C. J., Streatfeild and Ashworth JJ.: December 6, 1960: *The Times*, December 7, 1960.[4]

C., who was a club hostess, was convicted at quarter sessions of larceny by a trick. The evidence at the trial was that an American sergeant, on leave in London, was invited into premises in Soho by C. According to the sergeant, C. led him to believe that she was offering herself to him for prostitution and, having entered the premises, he parted with various sums of money for drinks and for a room. Later, when she arranged to meet him at a room, she did not turn up. C. denied in evidence that she had asked the sergeant for money for a room; he had only paid for drinks. On appeal to the Court of Criminal Appeal:

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[4] For the appellant: *W. R. Rees-Davies* (instructed by Messrs. Miles, Russell & Co.). For the Crown: *William Howard* (instructed by the Solicitor, Metropolitan Police).

Held, that it was perfectly clear that on the issues of fact the jury had accepted the evidence of the sergeant and that they had concluded that the appellant had been acting fraudulently throughout. However, this court had come to the conclusion that this was not a case of larceny by a trick. The distinction between the offences of larceny by a trick and obtaining money by false pretences was often a fine one. The guiding test in each case was whether the person whose money was obtained meant to part with the property in the money, in which case it was, if the representation was false as to an existing fact, false pretences, or whether that person meant only to part with possession, in which case, whether the representation was as to an existing fact or as to the future, it was larceny by a trick. In the present case the sergeant must have intended to pass not only the possession but also the property in each sum of money he handed over. They were advance payments, the property in which passed not conditionally on the services being rendered but in the hope that they would be rendered. By section 44 of the Larceny Act, 1916, a person charged with larceny by a trick could nevertheless be convicted of obtaining by false pretences. In most cases, however, the jury would be directed as to the offence of false pretences and counsel would be allowed to address the jury on that basis. That was not done in the present case. This court had power to substitute a verdict of guilty of another offence under section 5 (2) of the Criminal Appeal Act, 1907, but this jurisdiction had to be exercised with great caution and, in the present case, having particular regard to the fact that the jury never had a proper direction as to the offence of false pretences. However, in this case, the jury must have been satisfied that the sergeant entered the premises following the representation that the appellant was ready and willing to prostitute her body and had the necessary facilities, including a bedroom for the purposes of prostitution. In those circumstances, this court was clearly of the opinion that the jury must have been satisfied of facts which proved the appellant guilty of obtaining money by false pretences. Accordingly, a verdict of guilty of that offence would be substituted for the verdict of guilty of larceny by a trick. [H. P.]

Commentary. The distinction between larceny and false pretences depends, with respect, not on whether the owner *intended* to pass the property to the rogue, but on whether he actually did pass the property to him: "Larceny and False Pretences" [1956] Crim.L.R. 92. In most cases the answer to the question "Did the property pass?" will depend on the answer to the question "Did the owner intend it to pass?"; and therefore, as in the present case, the difference in the formulation of the rule will not affect the result. But there are cases in which the distinction is material.

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If the only representations in the present case had been promises as to the future, the crime would have been neither larceny (because the property passed) nor false pretences (because a representation as to a matter of fact is essential) but obtaining credit by fraud, contrary to section 13 (1) of the Debtors' Act, 1869: *R.* v. *Ingram* [1956] 2 Q.B. 424. The court was, however, able to discern a representation as to a matter of fact—*i.e.*, that the appellant had the necessary facilities, including a bedroom, for the purposes of prostitution. In similar cases in the future, it will be necessary to consider carefully whether a misrepresentation of fact is likewise present.

It appears that a number of prosecutions for larceny on facts similar to those of the present case have recently been brought successfully at the Central London courts: (1960) 96 J.C.L. 254, and see [1960] Crim.L.R. 704, 708. It would seem these persons were almost certainly wrongly convicted as there can be little doubt that the property in the money alleged to have been stolen was intended to pass and did pass.

A selection of the wrong charge is more serious in the case of a summary trial than in that of a trial on indictment. Section 44 of the Larceny Act, 1916, which allows a prisoner to be convicted of false pretences on an indictment for larceny and vice versa, has no application to summary proceedings. The power of the Divisional Court, on a case stated under section 6 of the Summary Jurisdiction Act, 1857, to "reverse, affirm or *amend* the determination in respect of which the case has been stated," does not apparently extend to situations of this type. *Cf.* the similar position under section 9 of the Criminal Procedure Act, 1851, where the accused is charged with an offence and it appears at the trial that he only attempted and failed to complete the offence: *Pender* v. *Smith* [1959] 2 Q.B. 84. The selection of the wrong charge in the case of a summary trial may, therefore, lead to the conviction being quashed and the prisoner going entirely free. It is submitted that there is everything to be said in favour of extending the operation of such provisions as section 44 of the Larceny Act and section 9 of the Criminal Procedure Act, to summary proceedings.

Why the court thinks it important that the jury should have had a proper direction as to the offence of false pretences when the question is whether a conviction for that offence can be substituted for one of larceny is a puzzling question. Since, in such cases, the jury, *ex hypothesi*, will have acquitted of false pretences, their verdict in relation to that charge can be of no assistance whatever to the Court of Criminal Appeal.

ROAD TRAFFIC

Motor Vehicles (Construction and Use) Regulations, 1955, regs. 73 and 104—causing or permitting to be used—whether absolute offences

F. Austin (Leyton), Ltd. v. East

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ.: November 10, 1960.[6]

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[6] For the appellant: *W. M. F. Hudson* (instructed by Daybells, Stratford). The respondent did not appear and was not represented.

Justices convicted A. Ltd. for unlawfully causing to be used on a road a motor-vehicle a part of which, *viz*., the trailer turntable on the drawing unit, was in such a condition that danger was caused to a person on the road contrary to regulations 73 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. The justices found that A. Ltd. used the vehicle on the road at a time when the locking mechanism of the drawing unit had not been properly maintained with the result that the unit became detached and the trailer slewed across the road; that the locking mechanism was in a defective condition which was the cause of the trailer becoming detached, as a result of which danger was caused to people on the road. The evidence before the magistrate was directed to such questions as whether the locking device had been properly maintained. On appeal by way of case stated it was contended that on the evidence before the justices it was impossible to say that the vehicle had not been properly maintained and that there must have been some latent defect in the locking mechanism as a result of which the two parts of the vehicle became disconnected; and that in the absence of any failure to maintain the conviction could not stand.

Held, that regulation 73 was absolute in its terms and was directed to the vehicle. It imposed an obligation that the vehicle at all times, that was to say, at any moment of a journey, must be in such a condition that no danger was caused to a person on the road and, therefore, even though the trailer had become disconnected because of some latent defect in the locking mechanism—which was probably the case—it could not be said that the offence had not been committed. When an offence did occur in such circumstances justices had ample powers to deal with it as a matter of mitigation but the justices were justified in finding the offence proved and the appeal would be dismissed.

[Mrs. E. M. WELLWOOD, *Barrister-at-Law*.]

Commentary. Regulation 104 provides that any person who "uses causes or permits to be used on any road a motor-vehicle or trailer in contravention of or fails to comply with any of the preceding regulations . . ." shall be liable to a fine of £20.

In *James & Son, Ltd.* v. *Smee* and *Green* v. *Burnett* [1954] 3 W.L.R. 631 it was held by a Divisional Court, Slade J. dissenting, in relation to the corresponding regulation of the Motor Vehicles (Construction and Use) Regulations, 1951, that there is an important difference between a charge of "using" and one of "permitting to be used." The former imposes an absolute prohibition, it is sufficient that the user is established and no *mens rea* (other, presumably, than an intention to use that vehicle) need be proved; the latter "imports a state of mind," apparently knowledge of the circumstances which constitute the contravention (*cf*. the court's reference to *Ferguson* v. *Weaving* [1951] 1 K.B. 814), knowledge in this connection including " the state of mind of a man who shuts his eyes to the obvious or allows his servant to do something in the circumstances where a contravention is likely, not caring whether a contravention takes [place] or not."

The majority in the two 1954 cases did not refer to the effect of " causes " as distinct from " uses " or " permits," but Slade J., who thought that " permits " imposed an absolute prohibition, at any rate in the case of a corporation, was apparently prepared to concede that " causes " requires some *mens rea*. He quoted Lord Wright in *McLeod* v. *Buchanan* [1940] 2 All E.R. 179, 187: " To ' cause ' the user involves some express or positive mandate from the person ' causing ' to the other person, or some authority from the former to the latter, arising in the circumstances of the case. To ' permit ' is a looser and vaguer term. It may denote an express permission, general or particular, as distinguished from a mandate." While the courts have not given a consistent answer to the question whether " causes " in a statute imports a requirement of *mens rea* (see Edwards, *Mens Rea in Statutory Offences,* Chapter VI) it is arguable that where " permits " and " causes " are used in the same section and " permits " is construed to require *mens rea*, " causes " should, *a fortiori*, be so construed.

In the circumstances it is respectfully submitted that it is unfortunate that " causes " was apparently construed in the present case as imposing an absolute prohibition. Apart from the evidently inconsistent interpretation of the regulation, it is submitted that it is bad policy to multiply offences of absolute prohibition. Where a blameless defendant is convicted it is no answer to say that the justices have power to mitigate the penalty. The very conviction is an injustice. Parker J. (as the Lord Chief Justice then was) said in *James* v. *Smee*: " Where legislation as here throws a wide net it is important that only those should be charged who either deserve punishment or in whose case it can be said that punishment would tend to induce them to keep themselves and their organisation up to the mark: *cf*. Devlin J. in *Reynolds* v. *G. H. Austin & Sons, Ltd.* [1951] 2 K.B. 135." It is submitted that the width of the " net " is the creation of the courts rather than of Parliament and that an unfortunate effect of it is that the distinction between those who should be convicted and those who should not is properly the duty of the courts and not of those charged with the responsibility for bringing prosecutions. Moreover, the words of Devlin J., adopted by Parker J. (above), were directed to the construction and not to the enforcement of the statute.

Road Traffic Act, 1930, s. 15—attempt to drive a motor-car in a public place being under the influence of drink—judicial notice of whether a car park public or private

Clift v. Long

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ.: November 10, 1960.[7]

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[7] For the appellant: *Francis Irwin* (instructed by Field, Roscoe & Co. for Gotelee & Goldsmith, Ipswich). For the respondent: *W. M. F. Hudson* (instructed by L. M. Symes, Town Clerk, Woodbridge).

An information was preferred against C. alleging that on January 2, 1960, he had unlawfully attempted to drive a motor-car in a public place, namely, a car park adjacent to the Pier Pavilion, Felixstowe, being under the influence of drink or a drug to such an extent as to be incapable of having proper control of the car, contrary to section 15 of the Road Traffic Act, 1930. The justices found that on the night of January 1, 1960, C.'s employer had given a party for his employees in the Pier Pavilion and at 2.15 the next morning C. had been found in his motor-car in the car park adjoining the pavilion under the influence of drink to such an extent as not to have proper control of the car. A submission of no case was made on behalf of C. on the ground that no evidence had been called on the question whether the car park was public or private, and in the absence of such evidence the inference to be drawn was that if the pavilion and car park were hired for a particular night for a particular function the right to use the car park vested in the hirers, their guests and invitees only. The justices, when invited to view the place, said they found it unnecessary to do so because they knew it well and it was in fact visible from the window of their retiring room. They were of opinion that the car park was a public place, and ruled that there was a case to answer. C. called no evidence and was convicted.

On appeal by way of case stated:

Held, that the justices were entitled to make use of their general local knowledge and as prima facie the car park was a public place within the meaning of section 15 they had come to a correct decision and the appeal would be dismissed.

[Mrs. E. M. WELLWOOD, *Barrister-at-Law*.]

Commentary. It seems to be accepted that justices may take judicial notice of the topography of their locality: *cf. Johnstone* v. *Hawkins* [1959] Crim.L.R. 459.

In general, the courts are very cautious in taking judicial notice of geographical matters other than the existence of certain territorial and administrative divisions. See *Deybel's Case* (1821) 4 B. & Ald. 243 and *Brune* v. *Thompson* (1842) 2 Q.B. 789.

Taking and driving away a motor-car—whether a "continuing" offence

R. v. Pearce

Court of Criminal Appeal: Lord Parker C.J., Slade and Elwes JJ.: November 14, 1960.[8]

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[8] For the appellant: *C. Nicholls* (instructed by Registrar, Court of Criminal Appeal). For the Crown: *R. Bax* (instructed by the Solicitor, Metropolitan Police).

P. was convicted at quarter sessions, *inter alia*, of taking and driving away a motor-van without the owner's consent. The jury were directed as follows: " Now, there is no evidence at all that he [the appellant] was present when it was first driven away; and the position is this, that if a team of people are going to borrow a car, and one of them makes use of the car later, not having been there when it was originally driven away, . . . there would be a new taking and driving away . . . because each time it is moved there is a new taking and driving away." On appeal to the Court of Criminal Appeal:

Held, that the learned chairman, in his direction to the jury, was treating the offence as a continuing offence where each time the car was moved there was a taking and driving away, and anybody who accepted a lift in the car knowing or suspecting it had been taken without consent was guilty of the offence. That was not the law, as was clearly shown by the decisions in *R.* v. *Stally*, 44 Cr.App.R. 5 and *D.* (*An Infant*) v. *Parsons* [1960] 1 W.L.R. 797. Of course, the fact that a man got into a car knowing that it had been taken away without the consent of the owner might be some evidence that he was acting in concert with the person who actually took it away; but the chairman had failed so to direct the jury. However, this was one of those cases where the appellant was clearly acting in concert with others in pursuance of a joint enterprise and, in those circumstances, any jury properly directed would have been bound to convict. Accordingly, this court would apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and the appeal would be dismissed. [H. P.]

Commentary. An offence is " continuing " only if all the elements in the *actus reus* are of a continuing nature. Thus, the offence under the Litter Act, 1958, of throwing down and leaving litter is not continuing, because while the " leaving " element continues, the " throwing down " element does not: *Vaughan* v. *Biggs* [1960] 1 W.L.R. 622. *Cf. Edwards* v. *Bull*, 54 L.G.R. 338; [1956] Crim.L.R. 416.

It would appear that the court in the present case must have been satisfied that the accused was acting in concert with the taker *at the time of taking* and that the evidence admitted of no other result.

SENTENCE

Administration of Justice Act, 1960, s. 16—sentence imposed without jurisdiction—power to amend conviction

R. v. Worthing Justices, ex p. W.

High Court of Justice: Queen's Bench Divisional Court: Lord

Parker C.J., Streatfeild and Ashworth JJ.: *The Times*, December 21 and 22, 1960.[9]

A boy aged fifteen was convicted before the justices on charges of obstructing a police officer in the execution of his duty, smoking on the lower deck of a bus, and behaving in a disorderly manner in a bus. None of these offences was one for which an adult could have been sentenced to a term of imprisonment. The justices made an order committing the boy to an approved school.

By section 57 (1) of the Children and Young Persons Act, 1933, it is a condition precedent to the making of an approved school order, in such a case, that the offence in respect of which the order is made should be one which, if committed by an adult, could attract a sentence of imprisonment.

Held, on an application for an order of certiorari, that, by virtue of the power conferred upon the court by section 16 of the Administration of Justice Act, 1960, fines totalling £9 would be substituted for the approved school order.

Per Lord Parker C.J.: " Until October of this year . . . the court would have quashed the conviction, the sentences having been imposed without jurisdiction; but now, by virtue of section 16 of the Administration of Justice Act, 1960, the court has power, in a case such as this, to amend the conviction by substituting, for the sentence passed, any sentence which the justices' court could have imposed." [D. C.]

Commentary. It was the common law rule that conviction and sentence were not severable and must stand or fall together. If, therefore, justices imposed a sentence not authorised by law for the offence of which the defendant was convicted, the whole conviction was bad on its face and had to be quashed: *R.* v. *Willesden JJ., ex p. Utley* [1948] 1 K.B. 397. In abolishing this technical rule, the Act makes an important improvement in the law.

Breach of order for conditional discharge—When to be dealt with

See R. *v*. WHITEHEAD, p. 109, *ante*.

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[9] For the applicant: *W. A. B. Forbes* (instructed by Messrs. Marsh & Freeman, Worthing).

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Indecent assault on female

In R. *v.* WHITEROD the court (Lord Parker C.J., Streatfeild and Nield JJ.: November 22, 1960) varied a sentence of seven years' preventive detention to one of two years' imprisonment. W. had pleaded guilty at quarter sessions to indecently assaulting a female by putting his hand up the skirt of a young married woman as she was boarding a 'bus. W., who was a man of thirty-nine years of age, had six previous convictions, all in respect of assaults on females, and two convictions of insulting behaviour. His last conviction for indecent assault was in 1951. The court stated that the learned recorder had no doubt felt that this man was a public nuisance and also that he required prolonged medical treatment. The maximum sentence for the offence was two years' imprisonment and, no doubt for that reason, the recorder had imposed preventive detention. This court, however, felt that, however desirable might might be for W. to be detained to receive prolonged medical treatment, the sentence of preventive detention was wrong in principle. W.'s last offence of this nature was as long ago as 1951. The appropriate sentence was one of two years' imprisonment.

Larceny

In R. *v.* BARLOW the court (Lord Parker C.J., Ashworth and Elwes JJ.: October 17, 1960) varied a sentence of seven years' preventive detention to one of four years' imprisonment. B. had pleaded guilty at quarter sessions to the larceny of a wallet containing £300 which he found under a pillow at a Church Army hostel where he had been employed. B., who was a man of fifty-one years of age, had fifteen previous convictions for petty theft between 1932 and 1956. There were no convictions between 1941 and 1947 nor between 1956 and 1960. The court stated that B. was clearly heading for preventive detention because society would have to be protected against him. The only question was whether that stage had been reached. B. had shown that for long periods of time he could pull himself together and stay out of trouble and he was not, therefore, a man whom one could in the ordinary way look upon as an habitual criminal. In the circumstances, this court felt that B. ought to have one more chance before he was sent to preventive detention. The offence was a mean one and justified a severe sentence. The appropriate sentence was one of four years' imprisonment.

In R. *v*. FANTHORPE the court (Lord Parker C.J., Ashworth and Elwes JJ.; October 17, 1960) upheld a sentence of seven years' preventive detention. F. was convicted at quarter sessions of stealing a purse from a woman's shopping basket in a shop. F., who was a man of forty-one years of age, had twelve previous convictions. The court stated that this case had caused them considerable anxiety. For fifteen years F. had served his country well in the Royal Navy, but the moment that service had ended he became a complete pest to society, committing offence after offence of a petty character. Five of his previous offences had been in respect of handbags and, as always where the offences were comparatively small in character, he had never had a really good long sentence, his longest previous sentence being twenty-one months' imprisonment. But for eleven years F. had been a pest to society and, in those circumstances, this court felt that there was nothing wrong in principle with the sentence of seven years' preventive detention.

In R. *v*. TRIGG the court (Lord Parker C.J., Ashworth and Elwes JJ.: October 25, 1960) upheld a sentence of borstal training. T. was a young man of nineteen years of age and had five previous convictions. The facts were that, with others, he had taken a motor-cycle combination; T. had thrown away one of a pair of gauntlet gloves which had been in the sidecar. T. pleaded guilty to the offence of larceny of the glove at a magistrates' court and, after committal for sentence, was sent to borstal training by quarter sessions. The court stated that this was not an easy case because the offence itself was a trivial one. However, the probation officer had reported that T.'s attitude had been indifferent and at times defiant, and that he seemed content to drift aimlessly and to live a life of idleness. The probation officer's view was that T. needed strict training and discipline under close supervision. The prison governor had said that T. was an aimless youth who needed firm control and supervision. Despite the fact that this was a trivial offence, in the light of those reports borstal training seemed to this court to be the proper sentence and was indeed in T.'s best interests.

Acts and Orders *

Animals

Fresh and refrigerated pork and edible pork offal originating in Argentina, Brazil, Chile and Uruguay are excluded from the category of meat which may be landed in Great Britain, and bacon and ham from those countries is required to be accompanied by a certificate that it has been fully cured. The provisions of the principal Order (S.I. 1954, No. 853) are amended accordingly. Operative February 1, 1961. IMPORTATION OF CARCASES AND ANIMAL PRODUCTS (AMENDMENT) ORDER, 1960 (S.I. No. 2094) (3d.).

For penalties for contraventions, see section 7 of the Diseases of Animals Act, 1950.

The Slaughter of Animals (Prevention of Cruelty) Regulations, 1958 (S.I. No. 2166), which otherwise came into force on January 1, 1959, provided for the deferment of certain requirements relating to the construction, layout and equipment of existing slaughterhouses until such later dates as the Minister might appoint. These provisions are now brought into operation on January 1, 1961, in a large number of local authority areas specified in the Schedule to the Order. SLAUGHTER OF ANIMALS (PREVENTION OF CRUELTY) REGULATIONS (APPOINTED DAY—NO. 3) ORDER, 1960 (S.I. No. 2154) (3d.).

Civil Aviation

Various provisions of the Civil Aviation (Licensing) Act, 1960 (see [1960] Crim.L.R. 644), are brought into operation on various dates as set out in the Schedule to the Order. CIVIL AVIATION (LICENSING) ACT (COMMENCEMENT) (NO. 2) ORDER, 1960 (S.I. No. 2093) (2d.).

Food and Drugs

Section 37 (1) of the Food and Drugs Act, 1955, relating to the compulsory use of special designations for retail sales of milk in any area of England and Wales in respect of which the Minister of Agriculture, Fisheries and Food makes an Order, is brought into operation in the areas specified in the Schedule to the Order. Operative November 28, 1960. MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) (NO. 2) ORDER, 1960 (S.I. No. 2018) (3d.).

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* Prepared by F. Maurice Drake, *Barrister-at-Law*.

For penalties for contraventions, see section 106 of the Food and Drugs Act, 1955.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 2159 (Carpenders Park, Watford) (2d.); 2160 (Dorking) (2d.); 2161 (Wandsworth) (2d.); 2191 (St. Marylebone and St. Pancras) (3d.); 2168 (Heston and Isleworth) (2d.).

Magistrates' Courts

The following Order has been made respecting Petty Sessional divisions: S.I. No. 2323 (Devon) (3d.).

Rules have been made prescribing the terms to be used in proceedings under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, and making other provisions about the procedure to be followed in such proceedings. Rule 7 specifies the persons who are to be made defendants to complaints for the revocation, revival or variation of matrimonial or interim orders under the Act. Operative January 1, 1961. MAGISTRATES' COURTS (MATRIMONIAL PROCEEDINGS) RULES, 1960 (S.I. No. 2229) (6d.).

Rivers

CLEAN RIVERS (ESTUARIES AND TIDAL WATERS) ACT, 1960 (8 & 9 Eliz. 2, c. 54) (6d.). This Act extends to tidal waters the control which river boards now exercise over non-tidal waters by section 7 of the Rivers (Prevention of Pollution) Act, 1951, by making it illegal without the consent of the appropriate board (which consent is not to be unreasonably refused) to bring into use any new or altered outlet for the discharge of trade or sewage effluent or to begin to make any new discharge of such effluent. The Act, which does not extend to Scotland or Northern Ireland, came into force on September 29, 1960.

For penalties for contraventions, see section 7 of the Rivers (Prevention of Pollution) Act, 1951.

Road Traffic

Section 15 of the Road Traffic and Roads Improvement Act, 1960 (which provides for charges to be payable for vehicles removed under statutory powers from roads and parking places, was brought into operation on November 28, 1960, and the persons by whom the charges are to be paid, and the scale of such charges, are prescribed. ROAD TRAFFIC AND ROADS IMPROVEMENT ACT, 1960

(COMMENCEMENT NO. 1) ORDER, 1960 (S.I. No. 2132) (2d.); REMOVAL OF VEHICLES (CHARGES) (ENGLAND AND WALES) (SCOTLAND) ORDERS, 1960 (S.I. Nos. 2140, 2220) (each 3d.).

Scotland

Part IV of the principal Regulations are revoked and there are substituted new provisions requiring ingredients used in the manufacture of ice-cream to be pasteurised, by one or other of three specified methods, or sterilised and afterwards kept at a low temperature until the freezing process is begun. They exempt from these requirements certain types of water ices and iced lollies which are sufficiently acid to make such treatment unnecessary. Operative November 23, 1960. ICE-CREAM (SCOTLAND) AMENDMENT REGULATIONS, 1960 (S.I. No. 2108) (3d.).

For penalties for contraventions, see section 40 of the Food and Drugs (Scotland) Act, 1956.

The outlays which shall be allowed to a solicitor in an undefended case where an inclusive fee is charged are increased from £6 6s. to £8 8s. Operative October 28, 1960. ACT OF SEDERUNT (ALTERATION OF COURT OF SESSION FEES), 1960 (S.I. No. 2066) (2d.).

The salaries of all whole-time probation officers of all ranks and temporary probation officers are increased with effect from October 1, 1960. The 1951 Rules are amended accordingly. PROBATION (SCOTLAND) AMENDMENT (NO. 2) RULES, 1960 (S.I. No. 2239) (4d.).

Theatre and Cinematograph

CINEMATOGRAPH FILMS ACT, 1960 (8 & 9 Eliz. 2, c. 14) (1s. 0d.). This Act amends the film quota legislation which requires cinema exhibitors to show a certain proportion of British films, and extends the legislation until the end of 1967 and brings newsreels within the scope of the legislation. The Act came into force on various dates, being finally operative by January 1, 1961.

For penalties for contraventions, see sections 2, 11 and 12 of this Act.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

75. *Sentence—breach of probation order—Criminal Justice Act,* 1948, *ss.* 6, 8 (5), 12 (1).

The Criminal Justice Act, 1948, s. 12 (1), states: "a conviction of an offence for which an order is made placing the offender on probation or discharging him absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made, etc."

Section 8 (5) states: "Where it is proved to the satisfaction of the court by which a probation order or an order for conditional discharge was made, etc., that the person has been convicted and dealt with in respect of an offence committed during the probation period or during the period of conditional discharge the court may deal with him in any manner in which the court could deal with him if he had just been convicted."

In view of section 12 (1) above, if for the subsequent offence a further probation order is made, can the offender be taken back and dealt with for the original offence under section 8?

If it is not regarded as a subsequent conviction could the offender be taken back under section 6—Breach of requirements—as not being of good behavious during the probation period? If he can be taken back then the court can deal with him as if he had just been convicted of the original offence.

Do you agree with this reasoning?

ANSWER

The word "etc." at the end of the first paragraph of the stated problem conceals what are, in fact, the most important words in this context. The quotation from section 12 (1) should continue: "and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act." Proceedings under section 8 (5) would be proceedings covered by those words and therefore the conviction would still count as a conviction in those proceedings. Proceedings for a breach of requirements under section 6 could not be taken in view of the concluding words of that section: "a probationer who is convicted of an offence committed during the probation period shall not on that account be liable to be dealt with under this section for failing to comply with any requirement of the probation order." [A. E. JONES.]

76. *Police—duty of prosecutor—duty to give defence copy of charge, and accused's statement(s)*

1. Is it considered in England the duty of the prosecution to give to the defence a written copy of the charge and statements made by the accused to the police?

2. A. is charged with receiving stolen property which was found on his premises. Information as to the whereabouts of the property was given to the police by C. who made a statement to the police indicating that A. received the property. Later C. made a further statement to the police in which he agreed that he was paid to "frame" A. by a rival trader. The police did not inform counsel for the defence of the existence of these statements. C. has disappeared and cannot be called as a witness for the defence. The prosecution made no attempt early in the investigation to make C. available to the defence. On cross-examination the police officer gave the name of C. as the informer but refused to produce the second contradictory statement. Is this a breach of professional conduct? The magistrate refused to allow defence counsel to cross-examine the police officer on the fact that C. had admitted the whole matter was a "frame up." Is there any way in which this evidence can be brought to the attention of the court in the absence of C.?

ANSWER

1. By virtue of a Home Office direction to all police forces a copy of any charge made must be supplied to the accused person. There is no duty on the prosecution to supply to the defence a copy of any statement made by the accused.

2. In *R.* v. *Bryant* (1946) 110 J.P. 267 it was laid down when the prosecution decide not to call a potential witness they should inform the defence and supply the witness's name and address, but they are under no obligation to give a copy of any statement made by a potential witness. As was pointed out by the Court of Criminal Appeal, any such statement would not be evidence in the proceedings.

In *R.* v. *Thomson* [1912] 3 K.B. 19 it was held, in an abortion case, that it was not admissible for the defendant to try to adduce by cross-examination of a witness that the woman in question (who was dead at the time of the trial) had stated her intention of performing an operation on herself to procure a miscarriage. In *R.* v. *Willis* [1960] 1 All E.R. 331 the general principles governing " hearsay " were considered and it was pointed out that a statement made by a person not called as a witness might be admissible as evidence if the purpose of adducing it was to establish, not its truth, but the fact that it was made. In the present case, the purpose of the defence was presumably to establish the truth of C.'s alleged statement and therefore the magistrate was justified in refusing to allow the cross-examination to proceed on that point. There was no question, as there was in *R.* v. *Willis* (above) of showing the effect of the statement on the accused's mind. [A. E. JONES.]

Letters to the Editor

Preliminary Investigation of Offences
"Justice" Report

Dear Sir,

I am surprised that Mr. Christopher Williams should try to create a sinister mystery out of the way in which the committee of JUSTICE on Preliminary Investigations of Criminal Offences went about its work. He writes that "it is hard to escape the feeling that much of the evidence (given to the committee) must have come from criminals themselves."

Mr. Williams obviously had not read the preface to the committee's report (omitted from *Criminal Law Review*), which contained the following passage:

> "Our report is confined to the examination of questions of principle which arise out of our terms of reference. We had no means of making any adequate investigations of allegations of injustice in individual cases. For this reason we have not attempted to act as a fact-finding committee, or to 'hear evidence' from 'witnesses.' We did, however, invite a number of persons, especially qualified by their experience, to come and discuss with us their views on certain of the issues we have examined. Some of them preferred that we should not mention their names, and we should therefore like to record our sincere thanks for all the valuable advice and help we received."

The "persons specially qualified by their experience" were six in number. Two were members of the Bar; two were journalists with long experience of covering criminal investigations and trials; one was a psychiatrist, and one was a sound recording engineer. None of them were criminals. We asked the Association of Chief Police Officers to allow one of their members to serve on our committee and also to submit evidence, but they declined to co-operate with us in any way.

Mr. Williams could have obtained this information before writing his article by speaking either to the Secretary of JUSTICE or to myself. He makes the point that complaints by criminals against the police are often unreliable. This rather elementary point was also present to the minds of the members of the committee. It was for precisely this reason that they did not interview any criminals.

In advancing his argument Mr. Williams says that ". . . the committee suggests that a confession properly obtained by the police from a criminal is not to be relied upon." The committee never said or suggested anything of the kind.

Yours faithfully,

ALEC GRANT,

Secretary of the Committee on Preliminary Investigations of Criminal Offences.

[Mr. Williams writes: It was this omission of the preface from the Crim.L.R. version which presented the difficulties I drew attention to. For it was only in the preface that a reader could have discovered that the conclusions and recommendations were based, not upon the evidence, but upon the personal impressions of members and those they consulted. Police readers know the value of personal impressions. But they do not make them public; they wait until they have evidence which can be subjected to cross-examination. As to Mr. Grant's last paragraph, readers may find it hard to see why, if the Committee is really satisfied as to the reliability of confessions obtained by the police, there should be any necessity for recommending changes in the procedure. If the suggestion is that confessions are not obtained properly, readers may feel that this particularly should be either supported by evidence, or declared to be based only upon impressions. In the absence of such a declaration, the whole value of the Report may be obscured by false assumptions in the mind of the reader.]

Books

Book reviews:

The Machinery of Justice in England. By R. M. Jackson. (3rd ed.) Cambridge University Press. 1960. xiii and 417 pp. incl. index. 45s. net.

Few lawyers have a better grasp of the practical working of the English legal system than Dr. Jackson, and his stimulating and very readable book will be welcomed in a new edition. Many lawyers will also agree with the strictures he makes on many out-dated relics which clutter up the scene. Not all will agree with his rather jaundiced view on almost all points. What has the Government of the day to do with the issue of legal aid certificates, so as to defeat a litigant who wanted to proceed against them (p. 144)? The author's view on the right of the magistrate's clerk to retire with the justices is by no means up to date (p. 160). Lawyers must not, in the author's view, be left to decide on matters like costs (p. 275) or legal aid (p. 286). Whitehall methods of discovering facts are better than legal rigmarole (p. 393). The Rule of Law is merely a " fine sonorous phrase " (p. 341). On the other hand we must all welcome the thoughtful study of sentencing technique (pp. 189–211) and the many other good features of this unique *cri de coeur.*

A. Kiralfy.

Books received:

Outlines of South African Criminal Law. Second edition by Alfred V. Lansdown. Cape Town, Wynberg, Johannesburg: Juta. 1960. xxiv and 400 pp. (incl. index). £4 6s. net. (Stocked and distributed in the U.K. by Sweet & Maxwell, Ltd.)

Homicide in an Urban Community. By Robert C. Bensing and Oliver Schroeder. Springfield, Illinois: Thomas. 1960. xii and 193 pp. (incl. index). 70s. net.

Readers' digest:

Betting and Gaming: The one-armed bandit and the law (founded on the Betting and Gaming Act, 1960): 104 *Solicitors' Journal* 1065.

Evidence; Perjury: Precious if not divine: 124 *Justice of the Peace* 853.

Juveniles: Beating young criminals: 124 *Justice of the Peace* 822.

Juveniles: The Report of the Committee on Children and Young Persons (continued): 124 *Justice of the Peace* 836.

Penal Reform: The Criminal Justice Bill: 110 *Law Journal* 839.

Police: The work of the river police: 28 *Medico-Legal Journal* 169.

Procedure; Habeas corpus: The Administration of Justice Act, 1960: 110 *Law Journal* 808; 104 *Solicitors' Journal* 1043.

Road Traffic: Dangerous driving (address by Devlin L.J. to the Magistrates' Association): 16 *The Magistrate* 143.

Road Traffic: Notice of intended prosecution: 119 *Police Review* 4.

Road Traffic: The Road Traffic and Roads Improvement Act, 1960: 104 *Solicitors' Journal* 1083.

Road Traffic: Road traffic: young drivers (founded on the Road Traffic (Driving of Motor Cycles) Act, 1960): 230 *Law Times* 362.

Sentence: Probation and compensation: 124 *Justice of the Peace* 821.

Sexual Offences: Indecency with children: 118 *Police Review* 952.

Trial: Fitness to plead: 110 *Law Journal* 810.

THE

CRIMINAL LAW REVIEW

March 1961

Imputations on the character of the prosecutor or the witnesses for the prosecution

This article by Mr. E. Griew[1] is in the nature of an experiment. As is indicated by the phrase " A Restatement " appearing at the end of the title, it is an attempt to provide a comprehensive statement of the existing law on a particular topic rather than a discursive article commenting on the law. The aim is twofold: to assist the practitioner to find authority on any aspect of the topic as speedily as possible ; and to enable the student to obtain a complete picture of the subject in a reasonable compass.

The first half of the article which appears in this issue deals with questions of definition arising on the Criminal Evidence Act, 1898, s. 1 (*f*) (ii), and with the interpretation of the section by the courts. The part to be published next month will cover the exercise of judicial discretion in the application of the section, questions of practice, and matters relevant to appeals.

Lady Chatterley's Lover

In this issue we are publishing the first part of an article by Mr. C. D. L. Clark which deals with the legal background of the Obscene Publications Act, 1959. The second part will contain a review of the proceedings against Penguin Books, Ltd. and comment on the possible consequences of the case.

Case and Comment this month includes a report and commentary on *R.* v. *Penguin Books, Ltd.* (see p. 176). We understand that there will be no Scottish sequel to the trial at the Old Bailey as the High Court of Justiciary has rejected Mr. M'Bain's application for leave to bring a private prosecution. The 1959 Act does not apply to Scotland, but the common law provides for a private prosecution where, as happened in this case, the Lord Advocate has refused to bring proceedings.[2] An applicant must show " not only a private interest but a personal and peculiar interest. He must show he has suffered some injury beyond what others have suffered."[3] The court held that Mr. M'Bain had failed to discharge this burden.

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[1] p. 142.

It may be felt that the decision to refuse leave, like the Lord Advocate's earlier decision, is a happy one on wider grounds. For although the two countries retain separate systems of law, it would not be to the credit of the larger nation of which each forms part if those systems should appear to sustain different standards of morals. Only if an acquittal by a first jury was felt to be clearly perverse would further prosecution based on the same book be justified.

Prosecutions by police

Following the series of articles entitled " Prosecuting Officer " by Christopher Williams, now published in book form, a senior police officer has given us his views and Mr. Williams has replied. Both letters appear in this issue at p. 199. This question is one which concerns all members of the legal profession who deal with criminal cases, and it is among the numerous topics covered by the memorandum of the Law Society to the Royal Commission on the Police.

Compensation for victims of crime

The subject of providing compensation for victims of criminal offences is one upon which two private members have felt strongly enough to introduce legislative proposals in the House of Commons this session. And it is understood, as these pages are written, that the report of the working party appointed by the Home Secretary to examine the subject is due for publication soon.

Mr. Carol Johnson's Criminal Injuries (Compensation) Bill was not reached on January 27 when it was to have its second reading; it is scheduled to be read a second time on March 24. The Bill proposed the extension of the industrial injuries scheme to provide benefits to persons, or the dependants of persons, suffering injury or death as victims of certain violent crimes or as a result of action taken to prevent the commission of one of those crimes. Entitlement to benefit would depend, in effect, upon the conviction of the criminal or on the decision of a coroner's court. The fact that the victim's own misconduct was partly responsible for the injury or death (a fact to be determined by the insurance officer) would justify a withholding of the whole or part of the benefit.

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[2] Under the English Act a private person can lay an information to lead to forfeiture of obscene publications, but if the case fails he, as informant, may be ordered to pay costs to the successful opponent of forfeiture (s. 3 (6)).

[3] *The Times*, February 4, 1961.

Apart from being unhappily drafted in detail, this short Bill seemed too facile an answer to a subject that is full of difficulties. It is not possible to raise here all the problems suggested by the Bill. But: Why should compensation be payable (in cases other than homicide) only when there has been a conviction? On the other hand, should a plea of guilty be necessarily conclusive of the question arising between the claimant and the insurance fund? Why should any reliance be placed for these new purposes on the antique and unreliable institution of the coroner's inquest? Upon what principles is the list of qualifying crimes to be compiled?

Mr. Hobson's Criminal Justice Act, 1948 (Amendment) Bill, which was given a first reading on January 31, offers a less revolutionary and very partial solution to the problem. At present criminal courts have power, when making a probation order or awarding an absolute or conditional discharge, to order the offender to pay damages for injury or compensation for loss (the sum awarded cannot in the case of a magistrates' court exceed £100). The amending Bill would give this power to the court " on passing any sentence or making any order." Where the offender has assets or, if he is not sent to prison, a decent income, the procedure in question is a means of avoiding civil proceedings. But in the normal case of the offender without assets who is sent to prison, the power to order him to pay compensation will not in practice be exercised, unless indeed the scales of remuneration in prison undergo drastic revision; and if those scales were revised, the further question would arise as to what proportion of a prisoner's earnings could be attached for the purposes of compensation.

A central police authority?

Lack of space prevents us from making detailed comment on the memorandum of the Law Society to the Royal Commission on the Police, but the recommendation to abolish watch committees and to replace them with a central commission with responsibility for the police on a national scale cannot be overlooked. Whatever reforms may follow the ultimate recommendations of the Royal Commission, we would strongly urge that they should not take the form of the creation of a central police authority. The acquisition of political control over local police authorities fortunately presents serious difficulties, but the takeover by the central government of a single body can be all too easy, as is shown by clause 23 of the Criminal Justice Bill which would abolish the Prison Commission and transform it into a department of the Home Office.

New detention centres

Two new senior detention centres have recently been opened for young men between seventeen and twenty-one. One is at Aylesbury: this will serve courts in the greater part of the Metropolitan Police District, in Hertfordshire and in parts of Buckinghamshire. The other is at Medomsley, Consett, in County Durham, and will serve five northern counties.

At the time of the publication of the White Paper " Penal Practice in a Changing Society " two years ago, four detention centres had been completed, and the two now opened constituted the rest of the inadequate programme that then existed. " Another six must be built," it was then said, and another six are now indeed planned. Their completion will be urgently awaited.

The poacher and the law

" The law was very firm—it
Took away my permit,
The worst punishment I ever endured."

Mr. Tom Lehrer's trigger-happy hero contrived to dispatch two game wardens, seven hunters and a cow; but the penalty was not more severe than that which is contemplated for certain more prosaic poaching offences by the Game Licences and Gun Licences (Miscellaneous Provisions), etc., Bill, recently introduced in the House of Commons by Mr. A. B. C. Harrison.

At present one effect of a conviction of, particularly, trespassing in pursuit of game is that any game licence or gun licence held by the offender is rendered void. The new Bill proposes that, instead, the licence shall be surrendered to the convicting court and forfeited and cancelled; and that the offender shall be disqualified from holding or obtaining a licence of the kind so forfeited for a year (or longer if the court thinks fit), unless the court otherwise orders, having regard to the offender's character, the nature of the offence and other relevant circumstances. The provision for disqualification of course renders necessary a further provision making it an offence to apply for or obtain a licence when disqualified (*cf.* Road Traffic Act, 1960, s. 110 (*a*)).

The suggested reforms may be commended as an application of the principles that the beneficiary of a licensing system should hold his licence during good behaviour and that disqualification should be threatened as a normal consequence of the revelation that he does not deserve the trust that is implicit in the granting of the licence. There are many who believe that such principles should be more freely applied to licensed road users.

Criminal Justice Bill

It was proposed to review the provisions of this Bill in this issue. But the vicissitudes of the Bill in committee have been so many and so varied that it is now proposed to defer consideration of it until it is possible to take account of all amendments and to give a reasonably clear picture of likely legislation.

Judicial appointments

Mr. Graham Rogers, T.D., has been appointed an Additional Judge of the Mayor's and City of London Court.

Mr. Stephen Chapman, Q.C., has been appointed Recorder of Cambridge.

Mr. Myer Alan Barry King-Hamilton, Q.C., has been appointed Recorder of Wolverhampton.

Mr. Chapman and Mr. King-Hamilton have relinquished their respective Recorderships of Rochester and Gloucester.

Mr. Humfrey Henry Edmunds has been appointed Deputy Chairman of the Surrey Quarter Sessions.

Mr. St. John Bernard Vyvyan Harmsworth has been appointed a Metropolitan Stipendiary Magistrate.

Erratum

We apologise for an error appearing at page 76 of the February issue where we stated that Sir John Robertson Dunn Crichton, Q.C., had been appointed Recorder of Manchester. This should have read Mr. John Robertson Dunn Crichton, Q.C.

Imputations on the Character of the Prosecutor or the Witnesses for the Prosecution— A Restatement

By Edward Griew, M.A., LL.B.

I. Subject-matter and Method

§ 1. Scope

This Restatement is concerned with so much of section 1 of the Criminal Evidence Act, 1898,[1] as relates to imputations made by the defence in criminal cases on the character of the prosecutor or prosecution witnesses; and with the effect of such imputations, in particular on the immunity of an accused who gives evidence from questions tending to show that he has a criminal record or is of bad character.

The law on this subject was much affected by the decision of *R.* v. *Cook* [2] in 1959. It is hoped here to state as fully as possible the position that appears to exist in the light of that case and of the subsequent cases of *R.* v. *Morris* [3] and *R.* v. *Brown*.[4]

§ 2. The Statutory Provision

The Criminal Evidence Act, 1898, provides by section 1, so far as relevant:

> " 1. Every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows . . .:
>
> (*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . .
>
> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given

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[1] 61 & 62 Vict. c. 36.

[2] [1959] 2 Q.B. 340, C.C.A.

[3] (1959) 43 Cr.App.R. 206, C.C.A.; [1959] Crim.L.R. 778.

[4] (1960) 44 Cr.App.R. 181, C.C.A.; [1960] Crim.L.R. 556.

> evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; . . ."

This Restatement does not deal with the situation in which questions are asked, or evidence is given, by the defence with reference to the accused's good character, but only with the second limb of paragraph (ii) of proviso (*f*).

The Criminal Evidence Act, 1898, will be referred to hereinafter as " the Act."

§ 3. Plan of the Restatement

It is proposed to preface the discussion of the main problems arising on the application of the statutory provision by dealing with some minor matters, mainly of definition (Part II). The problem of interpretation presented by the words of the second limb of section 1 (*f*) (ii) will be discussed in Part III. Part IV will be concerned with some of the matters which may affect the exercise of the judicial discretion shown by the authorities to exist in the application of the section. In Part V some matters of practice will be considered. Finally, in Part VI, some matters relevant to appeals will be mentioned.

II. Definition

§ 4. " Person charged and called as a witness "

The provisions of section 1, proviso (*f*) of the Act apply only where an accused is called as a witness. Where, therefore, the defence has in cross-examination attacked the character of prosecution witnesses, but the accused does not give evidence, the prosecution cannot, under the Act, give evidence of the accused's previous convictions. Nor is such evidence admissible at common law in these circumstances.[5] If the accused calls evidence of his own good character or cross-examines prosecution witnesses in an attempt to establish his good character, evidence can be given by the prosecution to show that he is in fact a man of bad character.[6] This is because he has put his character in issue. Where, however, he merely attacks the witnesses for the prosecution, he puts their characters in issue but not his own.[7]

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[5] *R.* v. *Butterwasser* [1948] 1 K.B. 4, C.C.A.

[6] [1948] 1 K.B. at 6; and see *R.* v. *Gadbury* (1838) 8 C. & P. 676; *R.* v. *Shrimpton* (1851) 2 Den. 319 (decided on 6 & 7 Will. 4, c. 111, and 14 & 15 Vict. c. 19, s. 9, respectively); *R.* v. *Redd* [1923] 1 K.B. 104.

[7] [1948] 1 K.B. at 7.

§ 5. "Character"

Where evidence is tendered of an accused person's good or bad character, such evidence should be limited to the general reputation of the accused and the witness should not, in strictness, speak of the accused's actual moral disposition or of his own opinion.[8] In section 1 (*f*) (ii) of the Act, however, the word "character" combines the two conceptions of general reputation and moral disposition.[9] Accordingly the nature or conduct of the defence may be such as to involve imputations on the character of a witness because of a suggestion made against the witness of actual dishonesty, immorality, and so forth.[10]

§ 6. "The prosecutor"

The Act does not define "prosecutor." Any question as to the meaning of the word must be largely academic, for in the vast majority of cases the prosecutor, whoever he be, will be a witness for the prosecution.

A magistrate who conducts the preliminary investigation which results in the committal for trial of the accused is not the prosecutor within the meaning of the section; nor is a police officer merely on the ground that he was involved in the inquiry or the collection of evidence.[11]

In a case of homicide the deceased is not the prosecutor, for "[there is] neither the will nor the intention on his part to prosecute. He [is] dead and [can] take no part in the proceedings."[12]

§ 7. "Witnesses for the prosecution"

This phrase presents no difficulty, but it should be observed that an accomplice called as a prosecution witness is in the same position under the section as any other witness. Even if the prosecution has already impugned the character of the witness by stressing that he was an accomplice, cross-examination of the witness which imputes to him the commission of some other crime [13] or which otherwise involves imputations on his character beyond what has already been revealed to his discredit by the prosecution [14] will render the accused liable to cross-examination on his convictions or character. An Irish case goes slightly further, holding that there is an imputation within the section if the defence alleges that a witness who, if the accused committed the crime charged, was admittedly an accomplice, himself committed the crime.[15]

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[8] *R.* v. *Rowton* (1865) L. & C. 520.

[9] *Stirland* v. *D. P. P.* [1944] A.C. 315, at 325, *per* Viscount Simon L.C.; *R.* v. *Dunkley* [1927] 1 K.B. 323, at 329, *per* Lord Hewart C.J. It is true that Viscount Simon was only "disposed to think" that this was the case, and that he was concerned with "good character"; and that in *R.* v. *Dunkley* the question was "not explicitly decided" ([1944] A.C. at 325). So far, however, as "character of the prosecutor or the witnesses for the prosecution" is concerned, there can be no room for argument on the point: almost all the cases in which the character of prosecutor or witness has been held to have been attacked depend upon the unspoken assumption that "character" includes actual moral disposition. See, to the same effect, *The People* (*A.G.*) v. *Coleman* [1945] I.R. 237, at 246, *per* Sullivan C.J., on the interpretation of identical wording in the Irish Criminal Justice (Evidence) Act, 1924.

[10] See last note, and the cases referred to in § 11, below.

[11] *R.* v. *Westfall* (1912) 7 Cr.App.R. 176, C.C.A. (defence allegations that magistrate had unfairly deprived accused of opportunity of calling a witness, and that detective, who was not a witness, had coached victim in his evidence and struck accused when he protested: held, not within the section).

[12] *R.* v. *Biggin* [1920] 1 K.B. 213, at 219, C.C.A. (murder).

Similar principles presumably apply to any witness tendered by the prosecution as a witness of bad character.[16]

The phrase " the witnesses " has not been read by the courts as requiring imputations on the character of more than one witness.[17]

III. INTERPRETATION AND APPLICATION OF THE STATUTORY PROVISION

§ 8. **General problem of interpretation**

This Part of the Restatement is concerned with the interpretation of the phrase " the nature and conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." The nature of the basic problem arising on the interpretation of these words has been put thus:

> " It is clear from the subsection [18] as a whole that it does not intend that the introduction of a prisoner's previous convictions should be other than exceptional. The difficulty about its phraseology is that unless it is given some restricted meaning, a prisoner's bad character, if he had one, would emerge almost as a matter of course. Counsel for the defence could not submit that a witness for the prosecution was untruthful without making an imputation upon his character ; a prisoner

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[13] *R.* v. *Cohen* (1914) 10 Cr.App.R. 91, C.C.A.

[14] *R.* v. *Watson* (1913) 8 Cr.App.R. 249, C.C.A.

[15] *The People* (*A.G.*) v. *Coleman* [1945] I.R. 237, Irish C.C.A.

[16] For prosecuting counsel's duty when tendering an accomplice or such a witness, see below, § 18 (a).

[17] *Cf.* Nokes (1959) 22 M.L.R. 511, at 512, referring to the Interpretation Act, 1889, which, by s. 1 (1) (*b*), provides that, in an Act of Parliament, unless the contrary intention appears, words in the plural shall include the singular.

[18] That is, s. 1, proviso (*f*) of the Act,

> charged with assault could not assert that the prosecutor struck first without imputing to him a similar crime."[19]

The efforts of the courts to escape from this dilemma have resulted in the existence of a number of irreconcilable decisions, and latterly in the emergence of a method of applying the section which renders doubtful the status of some of the earlier cases.

§ 9. **Liberal interpretation**

In some of the earlier cases decided on the second limb of section 1 (*f*) (ii) of the Act, the courts tended to put a limited construction upon the statutory words ("nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution"), with the effect of resolving in favour of the defence the dilemma referred to in § 8, above.[20] Thus, there are cases in which the courts would not hold a suggestion made against a prosecution witness to be an "imputation" within the meaning of the statute where the suggestion was made:

(a) as to the conduct of the witness in connection with the matters to which his evidence related[21];
(b) as to the conduct of the witness in the transaction with which the alleged offence was concerned[22];
(c) as a necessary part of the accused's defence to the prosecution case[23];

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[19] *R.* v. *Cook* [1959] 2 Q.B. 340, at 344–345, *per* Devlin J., C.C.A.

[20] *Cf. per* Devlin J. in *R.* v. *Cook* [1959] 2 Q.B. 340, at 345. Note *R.* v. *Turner* [1944] K.B. 463, at 469, *per* Humphreys J.: "[This] is one of the cases where the court is justified in holding that some limitation must be put on the words of the section, since to decide otherwise would be to do grave injustice never intended by Parliament."

[21] *R.* v. *Preston* [1909] 1 K.B. 568, C.C.A. (suggestion that police inspector "rigged" identification parade): see quotation from judgment in note 26, below. *R.* v. *Westfall* (1912) 7 Cr.App.R. 176, C.C.A. (allegation against constable of improper violence when effecting arrest: see *per* Hamilton J. at 179).

[22] *R.* v. *Morgan* (1910) 5 Cr.App.R. 157, C.C.A. (charge of obtaining by false pretences and obtaining credit by fraud; defence in part, a denial of indebtedness: allegation that prosecutor did not deliver an itemised bill and that his charges as an innkeeper were excessive): *per* Lord Alverstone C.J. at 161: "You cannot turn a defence involving a bona fide dispute which might justify a man in declining to pay into an attack on the witnesses for the prosecution."

[23] *R.* v. *Bridgewater* [1905] 1 K.B. 131, C.C.C.R. (charge of larceny: defence, that he was acting under instructions from detective; suggestion that detective had employed accused as an informer): *per* Lord Alverstone C.J. at 135: "If the questions put to [the detective] had involved the imputation that he was guilty of misconduct independently of the defence, or of the necessity for developing the defence, different considerations might arise, for the questions might then perhaps be construed as an attack on the

(d) by way of emphatic denial of the truth of the prosecution evidence.[24]

These cases show that the courts hesitated to deter the raising of a defence by too readily finding an " imputation " within the meaning of the statute[25]; and that they would most readily find such an imputation where the attack on the prosecution witness was made in relation to the witness's conduct outside the matters with which the case was concerned and for the purpose of discrediting his testimony.[26]

The early cases are not consistent in adopting this liberal approach to the statute; and the cases which adopt such an approach do not reveal the employment of any precise or consistent criteria.

§ 10. **Literal interpretation and judicial discretion**

The benevolent construction of the words of section 1 (*f*) (ii) suggested by *R.* v. *Bridgewater*,[27] *R.* v. *Preston*,[28] *R.* v. *Westfall*[29] and other cases mentioned in the preceding section has now been abandoned in favour of a stricter interpretation; and the harsh

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prosecutor's general character "; *R.* v. *Sheean* (1908) 21 Cox C.C. 561, Jelf J. (charge of rape; defence of consent); *R.* v. *Turner* [1944] K.B. 463, full C.C.A. (same; and allegation of preliminary indecency).

[24] *R.* v. *Rouse* [1904] 1 K.B. 184, C.C.C.R. (calling the prosecutor a liar); *R.* v. *Grout* (1909) 3 Cr.App.R. 64, C.C.A. (similar); *R.* v. *Stratton* (1909) 3 Cr.App.R. 255, C.C.A. (prosecutor not telling the truth); *R.* v. *Parker* (1924) 18 Cr.App.R. 14, C.C.A. (" police evidence is false ").

[25] See *per* Lord Alverstone C.J. in *R.* v. *Bridgewater* [1905] 1 K.B. 131, at 134: " raising a defence, even in forcible language, is not of necessity casting imputations on the character of the prosecutor or his witnesses. No doubt imputations may be cast on their character quite independently of the defence raised . . . "; and *per* Viscount Simon L.C. in *Stirland* v. *D. P. P.* [1944] A.C. 315, at 327 (*obiter*): " An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses " (referring to *R.* v. *Turner* [1944] K.B. 463, above, note 23).

[26] The *locus classicus* of the liberal approach is the statement of Channell J. in *R.* v. *Preston* [1909] 1 K.B. 568, at 575: " if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives the evidence or makes that charge. . . ." And see *per* Hamilton J. in *R.* v. *Westfall* (1912) 7 Cr.App.R. 176, at 179: " Instead of being an attack on the character of a witness with the view of shewing that he is unreliable, [the questions] are an endeavour to elicit the facts in connection with the very matter with which the prisoner is charged."

[27] [1905] 1 K.B. 131; above, note 25.

[28] [1909] 1 K.B. 568; above, note 26.

[29] (1912) 7 Cr.App.R. 176; above, note 26.

consequences that might follow from an automatic application of the provision so interpreted, are avoided by the existence of a discretion in the trial judge to disallow cross-examination on previous convictions or bad character notwithstanding that the defence has cast an imputation on the character of the prosecutor or a prosecution witness.

(a) *Literal interpretation:* The method now adopted of interpreting the statutory words was stated by a full Court of Criminal Appeal in *R.* v. *Hudson* [30] in 1912 in these words:

> " We think that the words of the section, ' unless the nature or conduct of the defence is such as to involve imputations,' etc., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words ' unnecessarily,' or ' unjustifiably,' or ' for purposes other than that of developing the defence,' or other similar words." [31]

This approach was confirmed in *R.* v. *Watson*,[32] *R.* v. *Jenkins* [33] and *R.* v. *Clark*,[34] and by a full Court of Criminal Appeal in *R.* v. *Cook*.[35]

(b) *Judicial discretion:* When, however, the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, the trial judge has a discretion to disallow cross-examination of the accused on his previous convictions or bad character. This discretion, though its existence had been observed earlier,[36] was first fully stated and examined in a case on the second limb of section 1 (*f*) (ii) in *R.* v. *Jenkins* [37] in 1945, and has since been re-asserted as an essential factor in the application of the section in *R.* v. *Clark* [38] and *R.* v. *Cook*.[39]

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[30] [1912] 2 K.B. 464, *per* Lord Alverstone C.J. at 470–471.

[31] " Other similar words ": *e.g.*, it seems, " unintentionally ": see *R.* v. *Pollinger* (1930) 22 Cr.App.R. 75, at 77, C.C.A. (the headnote to this report does not satisfactorily express the point of the case).

[32] (1913) 8 Cr.App.R. 249, at 254, C.C.A.

[33] (1945) 31 Cr.App.R. 1, C.C.A. (commenting, at 13, on the dictum of Viscount Simon L.C. in *Stirland* v. *D. P. P.*, quoted note 25, above: " It does not appear to us that the Lord Chancellor in using those words had in mind any idea of upsetting or weakening that which had been said in this court in *Hudson*.").

[34] [1955] 2 Q.B. 469, C.C.A.

[35] [1959] 2 Q.B. 340; [1959] Crim.L.R. 358.

[36] *R.* v. *Watson* (1913) 8 Cr.App.R. 249, C.C.A.; *Maxwell* v. *D. P. P.* [1935] A.C. 309, H.L. (noting, at 319, that the general prohibition imposed by s. 1 (*f*) on cross-examination of the accused as to his bad record is absolute, subject to the exceptions contained in the section: but that the permission to conduct such cross-examination granted by the exceptions is not absolute, but subject to the test of relevance: and see at 321: *per* Viscount Sankey L.C.).

[37] (1945) 31 Cr.App.R. 1, at 15, C.C.A.

The exercise of this discretion will be discussed in Part IV, below.

(c) *The present position:* That the method of applying the statute described above is now preferred to the method of liberal interpretation discussed in § 9 is clear from the elaborate judgment given by Devlin J. for a full Court of Criminal Appeal in *R.* v. *Cook*,[40] in the course of which the court approved this statement of the effect of the English cases offered in *O'Hara* v. *H.M. Advocate* [41]:

> "The net result seems to be that the Court of Criminal Appeal in England adheres to *Hudson* with certain modifications in cases of rape [42] and subject to the discretionary power of the presiding judge."

§ 11. **Imputations**

The following suggestions or allegations made against the prosecutor or the witnesses for the prosecution have been held to be "imputations" within the meaning of section 1 (*f*) (ii) of the Act (in the following list "witness" means "witness or prosecutor"):

(1) That the witness himself committed the crime with which the accused is charged.[43]

(2) That the witness is a receiver of stolen goods [44] or a thief.[45]

(3) That the witness is immoral.[46]

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[38] [1955] 2 Q.B. 469, at 478, C.C.A.

[39] [1959] 2 Q.B. 340, at 345 and 347, C.C.A.

[40] [1959] 2 Q.B. 340: "In our opinion the difficulties created by this subsection are as a general rule best dealt with in accordance with the principle in *R.* v. *Hudson* as applied in *R.* v. *Jenkins*" (at 347).

[41] 1948 S.C.(J.) 90, at 97, *per* Lord Justice-Clerk (Thomson).

[42] See below, § 14.

[43] *R.* v. *Marshall* (1899) 63 J.P. 36, Darling J. (murder: the evidence was that only the deceased, the accused and the witness were present at the time of the killing: the defence argued unsuccessfully that there could not be an imputation within the meaning of the section as even a simple denial by the accused would have meant that the witness did the killing); *R.* v. *Hudson* [1912] 2 K.B. 464, C.C.A. (larceny). And see *R.* v. *McLean* (1926) 19 Cr.App.R. 104, C.C.A. (false pretences and fraudulent conversion: allegation that prosecutrix spent the money and charged accused with the offence in order to explain how she no longer had it: held, an imputation); *The People* (*A.G.*) v. *Coleman* [1945] I.R. 237, Irish C.C.A.

[44] *R.* v. *Pollinger* (1930) 22 Cr.App.R. 75, C.C.A.

[45] *R.* v. *Morris* (1959) 43 Cr.App.R. 206, C.C.A. (that child witness had been stealing from school).

[46] *R.* v. *Jones* (1909) 3 Cr.App.R. 67, C.C.A. (that wife was guilty of immoral conduct with another man); *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1,

(4) That the witness invited the accused to engage in homosexual conduct.[47]

(5) That the witness, in a case of grievous bodily harm following a road collision, was quite drunk, was driving disgracefully, shouted abuse at other drivers and deliberately stopped in the middle of the road to prevent other cars from passing.[48]

(6) That the witness keeps a disorderly house.[49]

(7) That the witness is such "a horrible liar" that "his brother won't speak to him."[50]

(8) That the witness, a police officer, obtained an oral or written statement by bribes or threats[51] or fabricated a written confession.[52]

(9) That the witness, a police officer, fabricated evidence and obtained successive remands for the purpose of so doing.[53]

(10) That the witness initiated the prosecution as a result of malice or from a desire for revenge[54] or that the evidence of the witness is pure invention, fabricated because of a grievance against the accused,[55] or to further his own interests.[56]

(11) That the witness made misrepresentations as to the position of his family to ingratiate himself with the accused and wrote threatening letters to the accused.[57]

§ 12. Allegations held not to be imputations within the section

The following suggestions or allegations made against the prosecutor or witnesses for the prosecution have been held not to be "imputations" within the meaning of section 1 (*f*) (ii) of

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C.C.A. (that witness, a married woman, had spent a night with accused at hotel, and had allowed herself to be photographed in the nude); *R.* v. *Morris*, above (that child witness had had intercourse with a boy; that her mother had had intercourse with a man not her husband).

[47] *R.* v. *Cunningham* [1959] 1 Q.B. 288, C.C.A.

[48] *R.* v. *Brown* (1960) 44 Cr.App.R. 181, C.C.A.

[49] *R.* v. *Morrison* (1911) 6 Cr.App.R. 159, C.C.A.

[50] *R.* v. *Rappolt* (1911) 6 Cr.App.R. 156, C.C.A.

[51] *R.* v. *Wright* (1910) 5 Cr.App.R. 131, C.C.A. (admissions allegedly obtained from accused in custody by giving him tobacco and matches); *R.* v. *Cook* [1959] 2 Q.B. 340, C.C.A. (oral and written statements: allegedly obtained by threats that if accused did not speak his wife would be charged).

[52] *R.* v. *Clark* [1955] 2 Q.B. 469, C.C.A. ("confession" allegedly dictated by one police officer to another).

[53] *R.* v. *Jones* (1923) 17 Cr.App.R. 117, C.C.A.

[54] *R.* v. *Roberts* (1920) 15 Cr.App.R. 65, C.C.A.

[55] *R.* v. *Dunkley* [1927] 1 K.B. 323, C.C.A.

[56] *R.* v. *McLean* (1926) 19 Cr.App.R. 104, C.C.A., above, note 43.

[57] *R.* v. *Watson* (1913) 8 Cr.App.R. 249, C.C.A.

the Act (in the following list witness " means " witness or prosecutor "):

(1) That the evidence of the witness " is a lie and he is a liar " [58]; he " is telling lies " [59]; " not telling the truth " [60]; that police evidence is false.[61]

(2) That the whole of the evidence against the accused is concocted.[62]

(3) That the witness, a detective, had employed the accused as an informer.[63]

(4) That the witness, a constable, used improper violence in effecting an arrest.[64]

(5) That the witness, a police officer, " rigged " an identification parade.[65]

(6) That the witness is an habitual drunkard.[66]

(7) That the witness, an innkeeper, did not deliver an itemised bill and that his charges were excessive.[67]

(8) That the prosecutrix, in a case of rape, consented to the intercourse and engaged in preliminary conduct of an indecent nature.[68]

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[58] *R.* v. *Rouse* [1904] 1 K.B. 184, C.C.C.R. And see *R.* v. *Ferguson* (1909) 2 Cr.App.R. 250, C.C.A., *per* Lord Alverstone C.J., *arguendo*. Contrast *R.* v. *Rappolt* (1911) 6 Cr.App.R. 156, C.C.A. (§ 10 (7), above).

[59] *R.* v. *Grout* (1909) 3 Cr.App.R. 64, C.C.A.

[60] *R.* v. *Stratton* (1909) 3 Cr.App.R. 255, C.C.A.

[61] *R.* v. *Parker* (1924) 18 Cr.App.R. 14, C.C.A. For general statements on the subject of emphatic denials, apart from the cases in this and the preceding three notes, see *R.* v. *Jones* (1923) 17 Cr.App.R. 117, at 119, C.C.A.; *R.* v. *Clark* [1955] 2 Q.B. 469, at 478, C.C.A.; *R.* v. *Cook* [1959] 2 Q.B. 340, at 345, C.C.A. As to this kind of case in connection with the judge's discretion, see § 16 (c), below.

[62] *R.* v. *Westfall* (1912) 7 Cr.App.R. 176, at 179, C.C.A. (accused made this statement before magistrate, and the statement was put in evidence by the prosecution at the trial; " but this was not so much the basis of the defence as would justify us in saying that the nature of the defence involved imputations," etc.).

[63] *R.* v. *Bridgewater* [1905] 1 K.B. 131, C.C.C.R. This was one of the cases adopting a liberal interpretation of the statute: see § 9, above. But it is difficult to see how the defence suggestion could on any view be construed as an " imputation ": *cf. R.* v. *Hudson* [1912] 2 K.B. 464, at 469.

[64] *R.* v. *Westfall* (1912) 7 Cr.App.R. 176, C.C.A. See § 13, below.

[65] *R.* v. *Preston* [1909] 1 K.B. 568, C.C.A. See § 13, below.

[66] *R.* v. *Westfall* (1912) 7 Cr.App.R. 176, at 179, C.C.A. (suggestion made in cross-examination of the witness; but " there does not appear to have been enough said to constitute this such an imputation . . . as to render it from the nature of the defence an attack on his character and so expose the prisoner to such very serious consequences "). See § 13, below.

[67] *R.* v. *Morgan* (1910) 5 Cr.App.R. 157, C.C.A.

[68] *R.* v. *Turner* [1944] K.B. 463, C.C.A. (overruling *R.* v. *Fisher* (1899) 34 L.J. (News.) 100, Day J.); *R.* v. *Sheean* (1908) 21 Cox C.C. 561, Jelf J. See §§ 13 and 14, below.

§ 13. Effect of current approach to the statute (§ 10) on cases summarised in § 12

Many of the cases in which there have been held not to be "imputations" within the meaning of section 1 (*f*) (ii) must be considered as applications, when they were decided, of the liberal interpretation of the statute formerly in favour. This is not to say that those cases would necessarily be differently decided today. Even if the particular suggestion or allegation were now held to be an "imputation," the judge might, in the exercise of his discretion, nevertheless not permit cross-examination of the accused on previous convictions or bad character.

Among the items set out in § 12:

(a) Items 1 and 2 would probably in most cases be the subject of the exercise of the judge's discretion in favour of the accused (see § 16 (c), below).

(b) Items 3 and 7 would presumably be decided in the same way today, there being no "imputation."

(c) Items 4, 5 and 6 would now, it is thought, be held to involve "imputations," and the matter would in each case become one of discretion (as to which see Part IV, below).

(d) Item 8 is the subject of a special settled rule (see § 14, below).

§ 14. The rape cases. The possibility of analogies

(a) *Rape:* It is quite settled that when, on a charge of rape, the defence allege that the prosecutrix consented to the intercourse, cross-examination of the accused on his previous convictions or bad character is not justified by the statute.[69]

This rule can be, and has been, explained in two ways:

1. One of the essential ingredients of the crime of rape, to be proved by the prosecution, is the absence of consent on the part of the prosecutrix. The so-called "defence of consent . . . is, in truth, nothing more than a denial by the accused that the prosecution has established one of the . . . essential ingredients of the charge. It is, and must be, the prosecution which introduces the question of consent or non-consent."[70] On this ground it may be said that, although to suggest that the

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[69] Cases in note 68; and see *R.* v. *Clark* [1955] 2 Q.B. 469, at 475; *R.* v. *Cook* [1959] 2 Q.B. 340, at 347.

[70] *R.* v. *Turner* [1944] K.B. 463, at 469, *per* Humphreys J.; and similarly *R.* v. *Clark*, *ubi sup.*, note 69.

prosecutrix consented is in the ordinary sense an imputation on her character, it is not such an imputation as is intended by section 1 (*f*) (ii).

2. Alternatively, though the defence of consent involves an imputation, it has now been settled how the judicial discretion existing under the section shall be exercised.[71]

(b) *Analogies:* It is possible to argue, by analogy with the defence of consent to a charge of rape, that certain other defences to other charges should be capable of being raised without exposing the accused to cross-examination as to previous convictions, although such defences necessarily imply something to the discredit of a prosecution witness. A defence capable of such analogous treatment would be one which amounts to a denial of some aspect or ingredient of the offence charged as to which the prosecution has the burden of proof. A decision that the raising of the defence does not justify cross-examination under the statute could be explained by methods similar to the explanations mentioned above for the case of rape.

Two defences which might be so treated are:

(1) Consent as a defence to indecent assault (other than on a girl under the age of sixteen or on a woman whom the accused knows or has reason to suspect to be a defective).[72] The burden lies on the prosecution to prove the absence of consent.[73]

(2) Self-defence as a defence to assault, wounding, etc. Where this defence is raised, the jury must acquit if on the whole of the evidence they are left in doubt whether the accused may not have acted in self-defence.[74] It is true that the prosecution need not anticipate this line of defence by adducing evidence to negative self-defence in the first instance,[74] and, consequently, that if the defence leads no evidence directed to the issue of self-defence, a conviction may be proper although the prosecution evidence did not deal with that issue. But, the issue once raised, the burden lies on the prosecution; and to that extent the analogy with the defence of consent on a charge of rape holds good. Moreover,

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[71] *R.* v. *Cook, ubi sup.*, note 69.

[72] In which cases consent is no defence: Sexual Offences Act, 1956, s. 14 (2) (3).

[73] It is true that, when all the evidence is in, the judge need not mention the question of consent to the jury if there is no evidence from which the jury might reasonably infer consent or if the defence has not seriously sought to raise the issue of consent: *R.* v. *May* [1912] 3 K.B. 572, C.C.A. But the burden is no less upon the prosecution because that burden is sometimes discharged without opposition.

[74] *R.* v. *Lobell* [1957] 1 Q.B. 547, C.C.A.

the accused is asserting that what he did constituted, in the circumstances, no offence, thereby, as in the case of rape, denying the prosecution case.[75]

In cases of homicide the allegation that the killing was provoked by the deceased or was in self-defence does not raise any problem under section 1 (*f*) (ii), for the deceased is not the prosecutor [76] or a witness. A case could, however, arise in which the lethal act of the accused, directed at and provoked by A, accidentally killed B. If A gave evidence, the arguments above could be advanced to protect the accused from cross-examination under the section.[77]

(c) *Authority for and against analogy* (2) *above*. In *R.* v. *Biggin*,[78] the defence, on a charge of murder, was that the deceased had made indecent overtures to the accused and had violently attacked him, and that the killing was in self-defence. The Court of Criminal Appeal quashed a conviction of manslaughter on the ground that, the deceased not being the prosecutor, cross-examination of the accused under section 1 (*f*) should not have been permitted. In *R.* v. *Clark*,[79] however, Lord Goddard C.J., giving the judgment of the Court of Criminal Appeal, found another explanation of *R.* v. *Biggin*.[80] Having justified the rape cases on the ground that the defence of consent is but a denial of an essential ingredient of the offence charged, he said:

> "That also, I think, may be the explanation of *R.* v. *Biggin* . . . the prisoner was relying on provocation or self-defence, and the facts had to come out. Somebody had to explain why the attack took place, and until that was explained and why people should have been in the same room, and why there was a fight, it was impossible for any defence to be developed at all." [81]

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[75] Denying, it may be said, the *actus reus* of the offence: see, for a wide definition of *actus reus*, Williams, *Criminal Law, The General Part*, 19.

[76] *R.* v. *Biggin* [1920] 1 K.B. 213, C.C.A.

[77] Supported, in a case of provocation, by *Woolmington* v. *D. P. P.* [1935] A.C. 462; *Chan Kau* v. *R.* [1955] A.C. 206; *Bullard* v. *R.* [1957] A.C. 635. See also Cross, 75 L.Q.R. at 179.

[78] [1920] 1 K.B. 213.

[79] [1955] 2 Q.B. 469, at 475. See also, in support of the analogy, *O'Hara* v. *H.M. Advocate*, 1948 S.C.(J.) 90: but the Scottish approach to the statute in any case differs from the English, as this case shows.

[80] The alternative explanation is in fact offered, though not clearly, in *R.* v. *Biggin* itself: [1920] 1 K.B. at 221.

[81] See also *per* Devlin J. in *R.* v. *Cook* [1959] 2 Q.B. 340, at 344–345, quoted above, p. 145, text at note 19, where the learned judge appears to consider that some limit must be put upon the strict application of s. 1 (*f*) (ii) in a case where imputations are the inevitable consequence of a defence of (*e.g.*) self-defence; and *R.* v. *Brown* (1960) 44 Cr.App.R. 181, where it appears

On the other hand, in *R.* v. *Cunningham*,[82] provocation was the defence to a charge of malicious wounding. The substance of the provocation alleged was an invitation to homosexual conduct. The accused was convicted after cross-examination as to his previous convictions. The Court of Criminal Appeal dismissed an appeal, holding that provocation is not a defence to a charge of wounding. Lord Parker C.J. thought, though it was unnecessary to determine the question, that:

> " even if provocation was a proper defence, a question such as was put in this case must of necessity bring in the character of the prisoner."

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that the accused lost the protection of s. 1 (*f*) because his attack on the prosecutor went beyond the mere defence of self-defence.

[82] [1959] 1 Q.B. 288, at 290. See a critical note on this case by Cross (1959) 75 L.Q.R. 176.

Obscenity, the Law and Lady Chatterley—I

By Charles D. L. Clark,
Barrister-at-Law

In 1907 Methuen & Co. published a volume of *New Poems* by Herbert Trench and in 1960 a first edition of these poems, interpolated and " improved " by Sir Max Beerbohm, was on sale a few weeks after the verdict in *R.* v. *Penguin Books, Ltd.* The following " improvement " neatly illustrates the changing fashion in taboos on four-letter words. The printer in 1907 dared not print the word Hell in full, and Max takes over:

Apollo: Unkennelled H-ll was loose
And swarmed in escalade

Seaman: You say, Aitch, hyphen, double ell!
D'you mean that word that rhymes with Nell?
Dickens' heroine, Little Nell?

Apollo: Your question is indelicate,
Your curiosity too great,
Just what I mean, I *dare* not state.

Not until November 1960 was D. H. Lawrence allowed to state just what he had meant in *Lady Chatterley's Lover* thirty-two years previously and fifty-three years after the Seaman's indelicate question.

Even before the trial, *Lady Chatterley's Lover* must surely have been the most exhaustively discussed of all banned books, and its choice by the office of the Director of Public Prosecutions as a test case under the 1959 Obscene Publications Act ensured a further flood of comment. Before fact becomes fiction it seems worth trying to get the record on the case straight in the light of the history of obscene libel which led to the 1959 Act. The first Part of this article will therefore take the story up to the passing of the 1959 Act and the second Part will record the Penguin test case from the first press notice of Penguin's intention to publish, which appeared on January 7, 1960, to the verdict and its likely consequences for both legal and publishing practice.

PART ONE

The origins of the offence of obscene libel

The history of obscenity and the law in the United Kingdom has been most skilfully presented by Mr. St. John Stevas in *Obscenity and the Law,* now, alas, out of print, which took the narrative up to the first draft Bill of the Herbert Committee in 1955. The main point concerning pre-eighteenth-century history is that both Church and State were more concerned to combat religious and political offences than to stamp out obscenity. The Tudor and Stuart censorship, for example, which was exercised through the Stationers' Company, was aimed at religious and political malpractice. The Charter incorporating the Stationers' Company (1556) makes this plain: it opens—

"Know ye that we considering and manifestly perceiving that certain seditious and heretical books, rimes and treatises are daily published and printed by divers scandalous, malicious, schismatical and heretical persons . . . and wishing to provide a suitable remedy in this behalf," etc.

Over a hundred years later, the Licensing Act of 1662 is still aimed at books and pamphlets "wherein any doctrine or opinion shall be asserted or maintained which is contrary to the Christian faith, or the doctrine and discipline of the Church of England, or which shall or may tend or be to the scandal of religion, or the Church, or the government or governors of the Church, State or Commonwealth. . . ."

As late as 1708 [1] the court held that the publication of an obscene book was punishable only in the spiritual court. But in 1727 the Crown scored its first success in a temporal court, or at least its first *recorded* success.[2] A pornographic pamphlet entitled *Venus in the Cloister or the Nun in her Smock* was ruled an offence against the law as tending to corrupt the morals of the King's subjects. Now in *Read's Case* the indictment against *The Fifteen Pleagues of a Maidenhead*, which was undeniably a pornographic work, was thrown out in no uncertain terms. Powell J. said: "If there should be no remedy in the Spiritual Court, it does not follow there must be a remedy here. There is no law to punish it. I wish there were but we cannot make law." But the Licensing Act had expired in 1695 and the activities of Curl and his like had proliferated, so that when Curl was indicted in 1727 the court was anxious to do some oblique law-making and overruled *R.* v. *Read*, accepting the following argument of the Attorney-General: "This is an offence at common law as it tends to corrupt the morals of the King's subjects and is against the peace of the King. Peace . . . may be broken in many instances *without an actual force*." Thus was born the offence of obscene libel which, because of the words italicised in the Attorney-General's argument, does not require any actual or threatened breach of the peace. The use of libel is probably a throwback to the original *libellus,* literally a little book.

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[1] *R.* v. *Read* (1708) 11 Mod.Rep. 142.

[2] *R.* v. *Curl* (1727) 2 Stra. 788.

The Act of 1857, and the Hicklin case

The modern history of obscenity and the law starts, of course, with Lord Campbell's Act of 1857, which gave magistrates the power to destroy books or prints the publication of which in their opinion amounted to a " misdemeanour proper to be prosecuted as such." The Act was brought in because Lord Campbell was disturbed by the comparative failure of proceedings by the Society for the Suppression of Vice to stop the traffic in indecent literature. It was under Lord Campbell's Act of 1857 that seizure proceedings by magistrates eleven years later led on appeal to Cockburn C.J.'s famous test of obscenity: is the tendency of the publication to deprave and corrupt those whose minds are open to such immoral influences and into whose hands it may fall? [3]

What had happened was that an over-enthusiastic protestant had produced a pamphlet entitled *The Confessional Unmasked* (clearly, the thought of dirty deeds done among the hassocks has always been an exciting one) partly made up of obscenities which he claimed were all to be found in Roman Catholic theological works. Wolverhampton magistrates seized some of the stock. Quarter sessions revoked the destruction order (on the ground that the object of the writer was not to corrupt the public but to expose the Roman Catholic Church) and the Court of Queen's Bench restored it.

The obvious shortcomings of the *Hicklin* test are listed later. For the moment we may note that in order to apply it sanely in *Secker's* case,[4] Stable J. seemed to come near to evading it.

The Hicklin test and R. v. Secker (1954)

Secker's case has become a landmark in the history of obscene libel and Stable J.'s treatment of the *Hicklin* test is worth extended illustration. *The Philanderer,* the work for which Secker and Warburg were prosecuted is a sophisticated New York novel concerned with the degeneration of a happily married man whose private insecurity drives him to sexual conquest. The final lines of the novel are worth quoting because their moral message is so explicit that it seems extraordinary that the Director of Public Prosecution's office should have thought that the book could deprave or corrupt anyone at all. (Madeline is the philanderer's wife.)

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[3] *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360 at 371.

[4] *R.* v. *Martin Secker and Warburg* [1954] 1 W.L.R. 1138; [1954] Crim.L.R. 593.

> " . . . tiny actions, bit by infinitesimal bit bearing him forward, nearer and nearer the inevitable discovery, Madeline's discovery: of the pit in him, the blackness: the end of everything he had and wanted, ruin certain and irrevocable, two months, six months, three years from now, as he got into the car (*knowing* all of this deep down, dark and cruelly patient beneath the self-persuasion and surface actions, yet unable to stop) and nodded at this particular woman and said, 'O.K., everything settled,' and the car moved forward bearing him still further along toward the finish."

In applying the *Hicklin* test to this work Stable J. talked mainly of other things. He moved briskly from the obligatory

> "If in the course of this summing up I express my opinion about the matter, you are entitled to ignore it"

to

> "babies of either sex are not born into the world dressed up in a frock-coat or an equivalent feminine garment"

to

> "throwing one's mind back over the ages, the only real guidance we get about how people thought and behaved is in their contemporary literature"

to

> "If we are going to read novels about how things go in New York, it would not be of much assistance, would it, if contrary to the fact, we were led to suppose that in New York no unmarried woman or teenager has disabused her mind of the idea that babies are brought by storks or are sometimes found in cabbage patches or under gooseberry bushes?"

to

> "The literature of the world from the earliest times, when people first learned to write—literature sacred and profane, poetry and prose—represents the sum total of human thought throughout the ages and from all the varied civilisations the human pilgrimage has traversed."
>
> "Are we going to say in England that our contemporary literature is to be measured by what is suitable for the fourteen-year-old schoolgirl to read?"

And the jury duly acquitted. It is perhaps worth noting that this acquittal followed a summing up in which there was no detailed consideration of the law as stated in *Hicklin*.

The period from *Hicklin* to *Secker* saw a variety of "borderline" novels banned, the most notable being Lawrence's *The*

Rainbow in 1915 (now available in a Penguin edition), in 1929 Norah C. James's first novel *Sleeveless Errand*, which has never been published again in the United Kingdom, and Radclyffe Hall's *The Well of Loneliness*, which was eventually freed in 1949. In non-fiction, Charles Bradlaugh and Annie Besant were prosecuted for publishing a pamphlet advocating birth control in 1877, an activity which Marie Stopes in later years got away with, although her books on birth control were banned in Canada, the United States and Ireland. A number of cases, such as *R.* v. *de Montalk* [5] (1932), and *R.* v. *Reiter* [6] (1954) are important legally and are discussed in Part Two.

The 1954 prosecutions

Four notorious cases in 1954 suggested that Stable J. was fighting alone. A number of books which early in the year the defence in *R.* v. *Reiter* had unsuccessfully tried to put in evidence found their way to the desk of the D.P.P. and prosecution was launched against not only Secker and Warburg but also Werner Laurie over *Julia*, Hutchinson over *Septembers in Quinze*, Heinemann on *The Image and the Search* and Barker over *The Man in Control*. All the books had serious literary pretensions and all the publishers were and are wholly respectable, Hutchinson and Heinemann being, of course, the parent companies of two of the largest book publishing groups in the United Kingdom.

Werner Laurie pleaded guilty, possibly to avoid the expense of litigation, Hutchinson were found guilty and heavily fined, Heinemann were formally acquitted after two juries had failed to agree and Barker were acquitted after the jury had retired for approximately a quarter of an hour.

Werner Laurie were very lightly fined, thus suggesting that the meek, if they shall not inherit the earth, shall at least not be mulcted like the presumptuous.

The movement for reform

This outburst of activity by the D.P.P. disturbed many authors and publishers. A movement to reform the law was started in November 1954 by a committee set up by the Society of Authors under the chairmanship of Sir Alan Herbert and reached its first landmark with the introduction to the House of Commons in March 1955 of a Bill under the Ten Minutes' Rule by Mr. Roy Jenkins, M.P. It got no further then and when put up in November

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[5] 23 Cr.App.R. 182.

[6] [1954] 2 Q.B. 16; 38 Cr.App.R. 62; [1954] Crim.L.R. 384.

1955 by Mr. Hugh Fraser, M.P., was adjourned on the Second Reading on November 25. It was re-introduced by Lord Lambton on November 21, 1956, and the pressure group had the satisfaction (if that is the right word) of seeing the whole problem of obscenity, literature and the law referred to a Select Committee on the Second Reading on March 29, 1957.

Defects in the existing law

The main defects of the law as it stood when the committee was deliberating were:

(i) Under the *Hicklin* test the effect upon the fourteen-year-old schoolgirl still tended to be the criterion of obscenity.

(ii) No account was taken in the *Hicklin* test of literary merit (which had led defence counsel to parade literary lions for a call to the stand, which would never come, in the hope that the jury would recognise some of their faces and draw the appropriate conclusions).

(iii) The *Hicklin* test does not specify that the work should be considered as a whole, a defect which gave prosecuting counsel an eagerly grasped opportunity to do their purple best with purple passages.

(iv) Under the 1857 Act neither author nor publisher could intervene in the prosecution of a bookseller or printer if they were not already parties to the proceedings. Thus a living author could have his work condemned as filth for filth's sake without being able to lift a finger in his own defence. Indeed he might not even be aware at all that his work was being prosecuted as obscene. Where a bookseller, to save expense, pleaded guilty, the poor author never even had the chance of having his case argued at all.

(v) Prosecution was at the discretion of local magistrates who were enabled to make a destruction order even if the prosecution offered no evidence as to obscenity. (What normally happened was that the police got a warrant from the magistrates which enabled them to enter premises believed to contain obscene matter and to seize such matter. The police then summoned the bookseller to appear before the magistrates). As a result, as recently as 1954, Swindon magistrates managed to make fools of themselves by impounding *The Decameron*.

Recommendations of the Herbert Committee

The committee had two pressure groups to contend with, those who wanted to protect good literature and those who wanted to stamp out what is often delightfully referred to as "pure pornography." Its recommendations published in March 1958 went far to satisfying both wings. To take the points in the same order as the defects just listed above, the committee recommended:

(i) The *Hicklin* test should be preserved but the class of persons liable to be depraved should be defined in accordance with the explanation of the law in *R.* v. *Secker*. (Not an easy task: as I have indicated above, Stable J. took care not to explain the law.)

(ii) and (iii) The effect of the work should be considered as a whole and a defence of literary and artistic merit should be afforded.

(iv) The author should have the right to be heard, if not already a party, both on prosecution on indictment and in seizure proceedings under the 1857 Obscene Publications Act.

(v) The consent of the D.P.P. should be required for the initiation of proceedings.

The committee met the " stamp out the filth " wing by recommending increased powers of seizure for which the police had asked in evidence before the committee.

At this point the infighting in Parliament really started.

The Obscene Publications Bill, 1958 to 1959

In November 1958 Mr. Roy Jenkins introduced another version of his Bill, designed to give effect to the recommendations of the Select Committee. On December 16, 1958, the committee's report was debated in the House of Commons. From this moment the history of the Bill is characterised by the determination of the reformers to get specific reforms down in black and white in the face of, at the best, vague assurances and at the worst blatant hostility from the Government. Thus, when the Bill went to Standing Committee (at the adjourned Second Reading on January 23, 1959) the Government in effect produced a new Bill by proposing three new clauses of their own, and moving that all the existing clauses of Mr. Jenkins' Bill should be omitted. The Government apparently aimed to extend the scope of the Bill to include theatrical and film shows and despite assurances from the Solicitor-General the majority of the committee supported Mr. Jenkins' objections to thus opening the door to an undesirable form of theatre and film censorship by the courts.

On Report (April 24, 1959), a new clause was directed to the admissibility of expert evidence and was moved with reluctance by the Solicitor-General. The clause sought to allow expert evidence to establish and negative the defence of public good. The Solicitor-General argued that a judge would in a proper case admit such evidence, but that his discretion to determine what evidence was relevant and, therefore, admissible should not be interfered with by Parliament. In fact, something as near a package deal as makes no difference was arranged whereby, on Report, an amendment from the Standing Committee requiring the consent of the D.P.P. to the institution of criminal proceedings was struck out without opposition in return for this clause, admitting expert evidence on the question whether publication was in the interests of science, literature, art or learning or other objects of general concern. *But the expert was not to express his opinion on whether the publication was for the public good.* This limitation of the expert's role has been italicised because its effect is clearly visible in the ingenuity at the trial of Penguin Books displayed by defence counsel in attempts to get witnesses to express just that opinion before either Mr. Griffith Jones, the prosecuting counsel, or the judge could intervene.[7]

The Bill passed its third reading in the Commons without a division, and was piloted skilfully through the Lords by Lord Birkett. Two points about the Lords hearing seem worth making. As the Bill stood when it left the Commons the issue of obscenity and the issue of justification were separate. If the jury decided the work was obscene then they went on to decide if it was saved by literary, artistic, etc., merit. Some would have preferred to see the defence of literary, artistic, etc., merit written into the definition clause in the form that a work " shall not be deemed to be obscene " where the defence is made out. But the view that it is quite possible for a work to be *both* obscene *and* of literary merit was strongly held by Lord Birkett himself and therefore the Act emerged in this respect as it left the Commons, with the issues of obscenity and justification to be decided quite separately.

Secondly, the Lords restored the wider use of " publication " to include matter given or lent, for which the Solicitor-General had fought and lost both in Committee and on Report. On consideration of the Lords Amendments on July 22, 1959, he won. The Lords also wanted to add power to prosecute people who showed or projected grossly obscene films in private. This point the Solicitor-General also won on consideration of the Lords Amendments, despite Mr. Roy Jenkins' fears that the clause concerned gave the police an unreasonable licence to interfere with private liberty.

The Act received the Royal Assent on July 29, 1959.

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[7] See *R.* v. *Penguin Books, Ltd.* (1961), Penguin Books 3s. 6d.

Legal Aid in Scottish Criminal Proceedings

By Alistair R. Brownlie, S.S.C.

The Legal Aid (Scotland) Act, 1949, which introduced legal aid for civil litigation, provided also [1] that it should be available under a similarly comprehensive scheme for proceedings arising in any of the criminal courts in Scotland. While legal aid in civil matters came into operation in 1950 [2] the provisions for aid in criminal cases have never been brought into force and a Departmental Committee appointed to review these provisions and to consider their possible variation has recently reported.[3]

The existing practice

The representation of poor persons before the principal criminal courts in Scotland, the Report recalls, has for several centuries been assumed as a *munus publicum* by the Faculty of Advocates and the solicitor branch of the profession.[4] To discharge this duty a number of solicitors is appointed by the sheriff in each sheriff court district to be in attendance daily or at least available when required to represent those brought before the courts. In Glasgow as many as twenty-six solicitors are appointed each year. Six junior counsel are appointed annually by the Faculty of Advocates and four solicitors by the W.S. and S.S.C. societies [5] to assist poor persons in criminal trials before the High Court of Justiciary in Edinburgh and in criminal appeals. Similar arrangements are made for the circuit courts. In addition in Edinburgh and Dundee the local authorities retain the services of one or more solicitors to give advice and representation to persons charged with petty offences in the magistrates' (police) courts. Since there is no definition of " poor person " there is no bar to solicitors taking a fee from those who can pay, and in some districts this practice prevails. From 1953 a sum of £8,000 has been provided by the Scottish Home Department for distribution among the numerous agents who administer the voluntary scheme, which remains however "fundamentally an act of charity by the legal profession."[6] Counsel receive no fee whatever though travelling expenses and subsistence allowance for attendance at the circuit courts are now paid by the Exchequer. These arrangements have nevertheless imposed a heavy burden upon the profession and in some cases must have resulted in incomplete, uncertain and indifferent service.

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[1] By s. 1 and the 1st Sched.

[2] The Legal Aid (Scotland) Act, 1949 (Commencement) (No. 2) Order, 1950.

[3] The Report of the Committee under the chairmanship of Lord Guthrie was published in May, 1960 (Cmnd. 1015). Price 4s.

[4] *Graham* v. *Cuthbert*, 1951 J.C. 25.

[5] The Societies of Writers to the Signet and of Solicitors before the Supreme Courts are the two principal societies of solicitors in Scotland.

Yet the poor person in Scotland has long been afforded assistance on a much more extensive scale than in England. The Report estimates that about 10 per cent. of persons accused in courts of first instance in Scotland are now being represented as poor persons as against 1 per cent. in England and Wales under the Poor Prisoners' Defence Act, 1930. In most countries legal aid is more readily obtained in criminal than in civil cases,[7] but in the United Kingdom the reverse is true. The proportion of appellants receiving advice and representation in Scotland also seems to exceed the proportion receiving an appeal certificate[8] in England, but there has long been criticism of the reluctance with which the statutory legal aid certificates are granted in England.[9]

The recommendations of the Committee

The Report recommends that a scheme of legal aid administered by the Law Society of Scotland should supersede the present arrangements. This would provide a right to legal aid subject to a test of financial eligibility in all cases under solemn (indictment) procedure, and in summary sheriff court proceedings for offences punishable with imprisonment without the option of a fine. In other cases before the sheriff courts legal aid would be granted only after certification by the court. It is recommended that these provisions extend to juvenile courts, though the possibility that legal representation might add glamour to such cases and tend to defeat the purpose of the specially constituted tribunals was noted.

On the question of financial eligibility the Report was divided, the majority recommending determination by the court on the basis of a declaration of capital and income by the applicant, with a right of audience for the prosecutor. On this point one member of the Committee dissented and his recommendations include the determination by the court based upon prescribed criteria and excluding income from consideration. This minority recommendation also suggested contribution in appropriate cases from the applicant and a discretion to the court to grant legal aid in exceptional cases outwith the set financial limits where necessary for the ends of justice. Special provision was made in the Act[10] for securing legal aid without inquiry for persons indicted up to the point of liberation on bail or committal until liberation in due course of law, and in summary proceedings until the conclusion of the first pleading diet. The Report recommends that in summary offences the right to this early assistance should be limited to cases involving imprisonment without the option of a fine.

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[6] So described by Mr. Ewan Stewart, Advocate, in his Note of Dissent to the Report.

[7] "Legal Aid and the Rule of Law: A Comparative Outline," *Journal of the International Commision of Jurists*, Vol. 2, No. 2, p. 101.

[8] Under the Criminal Appeal Act, 1907, s. 10.

[9] A Barrister, *Justice in England* (1938), p. 200; Solicitor, *English Justice* (Pelican Ed.), p. 188; Egerton, *Legal Aid* (1945), p. 85.

Legal aid for appeals

In the case of appeals the Report adopts the procedure in civil cases and recommends that the appellant be required to satisfy a committee of the Law Society as to the substantial grounds of the proposed appeal. Under the existing arrangements many appeals are taken for entirely trivial reasons (including the pleasant change of a few days' transfer to the prison at Edinburgh) and a large proportion are subsequently abandoned. It is also contemplated that legal aid would extend to appeals by stated case from courts of summary jurisdiction. This form of review[11] which involves consignation of expenses, a court fee and the expense of duplicating the stated case is meantime outside the scope of the provision for poor persons, and in recommending that the court in fixing consignation should have regard to the means of the appellant the Committee are proposing to open up a means of appeal under which many not unimportant matters of law are brought to decision.

The Report would allow solicitor and counsel to be selected from a list of willing participants in High Court cases and appeals, and in addition senior counsel would be retained in all murder trials and appeals.[12] In other cases legal aid would extend to the right to employ solicitor only.

The effect of the recommendations

There is no doubt that if the recommendations of the Departmental Committee find effect the service for poor persons accused of crime in Scotland will be greatly improved, extended and modernised. Wisely the Committee have attempted to prune the extravagant scope of the original provision of the Act which would have allowed legal aid even for parking offences. They have also made a number of suggestions to ensure that the scheme does not encourage unnecessary expense to be incurred. One interesting novelty will be the scale of fees allowed to solicitors in criminal proceedings under the Act, which the High Court has power to determine[13] and which hitherto has been entirely lacking in Scotland, where the absence of any guidance on fees in criminal practice has proved an embarrassment to the solicitor endeavouring to hold a fair balance between the disruption of his work caused by his client's misdemeanours and the client's ability or inability to pay. The scale when fixed will surely bear no resemblance to the derisory remuneration originally prescribed under the 1930 Act in England.[14]

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[10] By s. 2 (2).

[11] Under the Summary Jurisdiction (Scotland) Act, 1954, s. 62.

[12] The traditional solicitude for the representation of the panel facing charges of murder was underlined in the case of *H.M. Advocate* v. *Manuel* [1958] Crim.L.R. 654 where the Dean and Clerk of Faculty travelled to Glasgow to appear before the trial court to intimate that the services of counsel were available to the accused, who had dispensed with counsel during the trial.

The Report appears to accept that an unavoidable result of the proposals will be an increase in the business of contested criminal proceedings and this coupled with the rising crime rate may in some courts necessitate the employment of additional staff. The new scheme is not likely to secure many acquittals of persons who without it would have been convicted, but it will lift the burden from the profession and enable a better service to be provided at reasonable state cost to all who enjoy the presumption of innocence in Scotland, and to those whose appeals have some apparent merit, at least so long as they continue to enjoy it. The subsidiary legislation required to put the Report's proposals into effect ought not to be long delayed, for, as the Report observes, " the day in which the doctor and the lawyer were the rich men of the community and could afford to spend a fair proportion of their time on unremunerative work of a charitable nature is over."

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[13] s. 13 (2).

[14] For an account of the meagre generosity of the earlier Poor Prisoners' Defence Act, 1903, see Marjoribanks, *The Life of Sir Edward Marshall Hall* (1929), pp. 328 *et seq.* The current provisions are somewhat improved. For example the Poor Prisoners' Defence (Fees and Expenses) Regulations, 1959, permit the English solicitor a maximum fee of £13 10s. for the first day of a trial. See also Poor Prisoners' Defence (Defence Certificate) Regulations, 1960.

Driving Disqualification of Young Persons

By EDMOND GABBAY
Barrister-at-Law

The Road Traffic Act, 1960

Traffic laws in England, Scotland and Wales have come in for a new look in the Road Traffic Act, 1960, which is considered to be one of the biggest consolidating statutes passed during the last decade. It consolidated the existing law on road traffic with some corrections and improvements, and *inter alia*, repealed substantially the Road Traffic Acts, 1930 to 1956, and came into operation, subject to certain exceptions, on September 1, 1960. The immediate impact introduces no change for persons under twenty-one; but leaves in its wake a short amending Act which enables the Minister of Transport by regulation to reduce the prescribed *minimum age* of sixteen years to fifteen years for obtaining a driving licence for *mopeds* (motor-cycles equipped with pedals whose cylinder capacity is under 50 c.c.); and as from July 1, 1961, to limit motor-cyclists driving on provisional licences to an engine capacity of 250 c.c. While the Minister of Transport was granted power to prescribe a lower minimum age for driving motor-cycles under section 97 (2) of the Road Traffic Act, 1960 (*cf.* s. 10 of the Road Traffic Act, 1956, when it was first granted) he has not yet made use of this power, except to give support to the Road Traffic (Driving of Motor Cycles) Act, 1960.

Similarly to the Road Traffic Act, 1930, s. 9, this new statute too regards the under-21-year-olds as disqualified from " holding or obtaining " any licence to drive on the road a motor-vehicle of specified class or description (s. 107), and divides them into three age-groups [1]:

1. Persons under 16 years of age are generally prohibited from driving any motor-vehicle on a road;
2. Persons of 16 years of age are permitted to drive a motor-cycle or invalid carriage (this amends section 2 (4) (*c*) of the Road Traffic Act, 1930, which included the driving of a motor-cycle and a sidecar);
3. Persons of 17 years of age and under 21 are allowed to drive

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[1] s. 97 (1).

> on a road a motor-car; a tractor used primarily on land for farm purposes; but none of the following: (1) a heavy or light locomotive; (2) a heavy motor-car; (3) a motor-tractor, except one on land for farm purposes, *supra*.

The relevant date on which a person attains a given age is the first moment of his birthday.[2]

The driving disqualification of the young is very strict, and those who do drive while disqualified or *cause or permit* a young person to drive a motor-vehicle on the road in contravention of any of the prohibitions enumerated in section 97 of the Act, are guilty of an offence for which no limit to the period of disqualification is specified—see offence No. 15 in Schedule 11 to the Act. An improvement is introduced by section 104 (2), which expressly excludes obligatory disqualification for the offence of aiding and abetting, counselling or procuring, or inciting to the commission of an offence under the Act. Holders of international driving permits are not affected by these prohibitions by reason of their being under age.[3–4]

The nature of disqualification

A person has a driving disqualification either by reason of being under age or as a result of a specific motoring offence by court order. A driving disqualification deprives one from " holding or obtaining " a driving licence. If a licence is obtained by a person who is disqualified, such a licence will be void.[5] Where a licence was obtained by a boy under 16 years of age by means of false pretences, the father was charged with *permitting* his vehicle to be used on one occasion without third-party insurance. The offence was held to be proved.[6] Again, in *Evans* v. *Walkden*,[7] B.'s son, who was under 17 years of age, drove on a road without a licence and the father, himself a licensed owner of the car, did not control the car and only sat beside his son, next to the driving seat. At no time did the father control the son's driving. The court allowed the appeal on the ground that the father was not the driver of the car, since the son was not under his control. Furthermore, in *Police* v. *X*.,[8] a boy under ten years of age drove an agricultural tractor for a few yards on the highway. He was charged with driving it on the highway being under 21 years of age and also driving while uninsured. The Chippenham juvenile court dismissed the first charge on the basis that he should have been charged under section 9 (1) of the Road Traffic Act, 1930 (now section 97 (1) Class 3 of the Road Traffic Act, 1960). On the second charge, however, the court refrained from disqualifying him for special reasons.

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[2] *Re Shurey, Savory* v. *Shurey* [1918] 1 Ch. 263.

[3–4] Motor Car (International Circulation) Order, 1930 (S.R. & O. 1930), art. 6.

[5] s. 109 (2).

[6] *Mumford* v. *Hardy* [1956] 1 W.L.R. 163; [1956] Crim.L.R. 206.

[7] [1956] 1 W.L.R. 1019; [1956] Crim.L.R. 776.

[8] [1956] Crim.L.R. 491.

As to what will amount to driving, there is an authority which shows that merely steering one's vehicle without running the engine is sufficient to be held driving for disqualification purposes. This was decided in *Saycell* v. *Bool*[9] where B. sat in his lorry and let it run 100 yards down an incline without any petrol in the tank. He was, nevertheless, guilty of driving a motor-vehicle while being a disqualified person.

The power of disqualification

Where there are special reasons or no provisions for disqualifying, a court of law will not impose a driving disqualification. Two subsections (s. 12 (1) and 12 (2)) of the Criminal Justice Act, 1948), allow for avoidance of disqualification. In fact section 12 (2) expressly states that a probation order, conditional discharge or absolute discharge is to be disregarded for the purposes of any enactment which imposes any disqualification or disability. But these provisions must not be used to avoid disqualification if there is no other offence for which disqualification is specified in addition, and is imposed. This follows from the judgment of Lord Goddard C.J. in *Dennis* v. *Tame*[10] which was decided on the Road Traffic Act, 1930. In this case, an airman was charged with using an uninsured motor-vehicle on the highway. The charge was proved, but the justices granted him a conditional discharge on the ground that he had already been punished by his commanding officer for the same offence. The learned Chief Justice directed the justices to impose a penalty and disqualify, as the fact of the defendant's punishment by his commanding officer related to the offender and not to the offence at all.

On the question of suspension of disqualification during a period pending an appeal, the court is given an absolute discretion whether to grant such suspension.[11] Previously, an appeal did not operate by itself to suspend automatically the driving disqualification.[12]

A disqualification may be removed *in toto* on subsequent good behaviour but the court has no power to vary it: *R*. v.

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[9] [1948] 2 All E.R. 83.

[10] [1954] 1 W.L.R. 1338n.; [1954] Crim.L.R. 472.

[11] s. 105 (1); this follows s. 28 of the Road Traffic Act, 1956.

[12] *Kidner* v. *Daniels* (1910) 102 L.T. 132.

Cottrell[13] where the Court of Criminal Appeal upheld McNair J.'s ruling on this matter. *Per contra*, an excessive disqualification can be severed from conviction and fine. This was held in the case of *R.* v. *Arundel JJ., ex parte Jackson*[14] where the justices disqualified beyond the limit allowed by law, *i.e.*, twelve months' instead of one month's disqualification, which is the maximum period for careless driving. It follows from this authority that since sentence and conviction are severable, one can appeal against a disqualification order alone.

Disqualification is also applicable to the offence of taking and driving away a motor-vehicle without the consent of the owner or his lawful authority[15] (commonly known as a "joy-ride"), which is often committed by young offenders. In such an offence, an offender may either be a principal or a party to the original taking. This was made clear in *D.* (*An Infant*) v. *Parsons*[16] where the court allowed an appeal by D., a fifteen-year-old boy, against his conviction for taking and driving away a motor-cycle wrongfully taken by his friend F., of the same age, some hours before. There was no evidence that D. who rode as a pillion passenger was concerned in the original taking by F. This decision followed *R.* v. *Stally*[17] where Barry J. said (at p. 82):

> "In very many cases the fact that a man entered a car which he knew had been stolen and then drove in it, might well lead the jury to the conclusion that that man had been a party to the original taking, in the sense that the taking had been a joint enterprise between him and the driver of the car. The jury has therefore to be directed that they must be satisfied on the evidence that a co-defendant is in fact a party to the original taking."

Young persons ought to be disqualified from driving in motoring offences such as driving whilst disqualified or uninsured, or taking and driving away a motor-vehicle, and if they have a previous record of similar offences and no other method is suitable, then a sentence of imprisonment may be the right one.[18] The form of sentence to be imposed on committal where a sentence of Borstal training is coupled with disqualification was settled in *R.* v. *Dangerfield*.[19] Here D. was convicted at a magistrates' court for taking and driving away a motor-cycle without authority or insurance and consequently was committed to the Middlesex Quarter Sessions for sentence under section 28 of the Magistrates' Courts Act, 1952. He was sentenced on five charges to Borstal training and to five years' disqualification to run concurrently on all charges. The Court of Criminal Appeal ruled that the form of sentence should be varied to one of Borstal training on the first four charges and to five years' disqualification on the fifth charge. The reason assigned in the judgment of the court was that this method of sentence is designed for section 20 (5) (*a*) of the Criminal Justice Act, 1948, which gave no power to a court of quarter sessions to impose a sentence of disqualification in addition to a sentence of Borstal training. In the light of this authority a very similar form of sentence should apply in cases where the coupling of a sentence for an approved school or a detention centre with an order for disqualification is contemplated.

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[13] [1956] 1 W.L.R. 70; 39 Cr.App.R. 198; [1956] Crim.L.R. 127.

[14] [1959] 2 Q.B. 89; [1959] Crim.L.R. 526.

[15] s. 217 (1) and Sch. 11.

[16] [1960] 1 W.L.R. 797; [1960] Crim.L.R. 711.

[17] [1960] 1 W.L.R. 79; [1960] Crim.L.R. 199.

[18] *Davidson-Houston* v. *Lanning* [1955] 1 W.L.R. 858; [1955] Crim.L.R. 311.

[19] [1959] 3 All E.R 88; 43 Cr.App.R. 164; [1959] Crim.L.R. 581.

Practice and Procedure

Administration of Justice Act, 1960

Applications for leave to appeal to the House of Lords

In *R.* v. *Daines and Williams* (December 12, 1960), the Court of Criminal Appeal dealt with two applications for leave to appeal to the House of Lords under section 1 of the Administration of Justice Act, 1960. Lord Parker C.J., giving the judgment of the court, said that these were the first two applications under the Act, in view of which the applicants had been granted legal aid and the right to be present. It was, however, a perfectly plain case in which no point of law of general public importance arose. The court desired to say that in the future in a case where there did not seem to be any point of law of general public importance the court would deal with the matter on the papers without granting legal aid or leave to be present. [H. P.]

Procedure on appeals under the Act

See under **Acts and Orders, Criminal Procedure,** below, p. 190.

Case and Comment *

ASSAULT

Offences against the Person Act, 1861, *s.* 38*—knowledge of fact that person assaulted is a peace officer—belief that person assaulted was committing a felony or breach of the peace*

R. v. Malcolm Mark, Brown and Maureen Mark

Central Criminal Court: Maxwell Turner J.: October 28 to November 3, 1960.[1]

The two first defendants were charged with robbery together, and all three were charged with assault on a peace officer. The constable concerned chased Brown from the scene of the robbery and was in the act of arresting him when the other two interfered with the result that Brown escaped. The defence of the two Marks was that they acted under the mistaken belief that Brown was being robbed by some person unknown to be a police officer. Brown claimed that he was attacked by the constable who was in plain clothes and whom he did not know to be a police officer, while he was on his lawful occasions. After argument citing: *Russell on Crime,* 11th ed., p. 763; *Christie* v. *Leachinsky* [1947] A.C. 573; Foster *Crown Cases* 318; *R.* v. *Forbes and Webb* (1865) 10 Cox 362; *R.* v. *Maxwell and Clanchy* (1909) 2 Cr. App.R. 26:—

Held, although knowledge that the person assaulted was a peace officer is not an ingredient of the offence under section 38 of the Offences against the Person Act, 1861, an unlawful assault is one of the ingredients and so if the jury believed that the defendant acted under a genuine belief, honestly and reasonably held, that the person assaulted was in the act of committing a felony or breach of the peace, they should find the defendant not guilty.

Verdict. All three guilty.

[C. B. ORR, *Barrister-at-Law.*]

Commentary. In *R.* v. *Forbes and Webb* (above) it was held that the accused's ignorance that the person assaulted was a police officer was no defence. The case is criticised by Dr. Glanville Williams, *The Criminal Law*, 157, who writes, "The only useful comment that can be made upon *Forbes* is that it is a mere direction to the jury by a Recorder and is unsound." It is respectfully submitted that his criticism is justified. *Cf.* 76 L.Q.R. 78 *et seq.*

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the prosecution: *M. Corkery* (instructed by the Solicitor, Metropolitan Police). For the defence: *L. Thompson* (instructed by Parlett, Kent & Co., London, W.C.1).

The direction in the present case (apart from the use of the word "reasonably") is clearly correct. If the accused's belief had been as they claimed, their acts, on the facts as they saw them, would have been perfectly lawful; *i.e.*, they had the *mens rea* of no crime. The requirement of reasonableness is more difficult to justify. Why should a man be convicted of an assault if he has an honest but unreasonable belief that he is going to the aid of the victim of a robbery? He may be foolish, impetuous, or merely short-sighted, but his intention, far from being criminal, is laudable.

MONEYLENDERS

Moneylenders Act, 1927*—moneylending in course of retail business —personal credit scheme—definition of moneylender*

MacDonald v. N. G. Napier, Ltd.

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmount and Guthrie: 1960 S.L.T. 345.[2]

N., Ltd., who control forty retail shops selling a wide range of goods and operate some 69,000 open ledger accounts, mostly under a personal credit scheme, were charged with a contravention of section 5 (2) of the Moneylenders Act, 1927, when they advertised their facilities for lending money to the public in the Press. On the prosecutor's appeal by stated case against acquittal:

Held, that N., Ltd., were outwith the restrictions of the Act since lending money was merely ancillary to the primary object of their business, and they were entitled to the exemption afforded by section 6 (*d*) of the Moneylenders Act, 1900.

Commentary. The statutory definition of a moneylender excludes in section 6 (*d*) "any person . . . bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money." As McCardie J. observed "it is ever a question of degree": *Edgelow* v. *MacElwee* [1918] 1 K.B. 205. In that case a solicitor who habitually lent money to clients and others was held to be a moneylender, as was the jeweller who lent to customers to extend his business in *Fagot* v. *Fine* (1911) 105 L.T. 583. But an auctioneer who expanded his clientele by giving advances on bills of sale at 15 per cent. was not: *Furber* v. *Fieldings,*

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[2] For the appellant: *Lord Advocate* (*Grant, Q.C.*), *Law, A.-D.* (instructed by Lionel I. Gordon, Crown Agent). For the respondents: *Robertson, Q.C., Dick* (instructed by W. Gray Miller, s.s.c., for McCosh & Gardiner, Solicitors, Ayr).

Ltd., 23 T.L.R. 362; nor was the art valuator who lent on bills to customers in *Litcheld* v. *Dreyfus* [1906] 1 K.B. 584. To qualify as a moneylender there must be a business with system, repetition and continuity; occasional loans to friends would not suffice: *Newton* v. *Pyke* (1908) 25 T.L.R. 127; and four transactions with insurance contacts were insufficient in *Tuchman* v. *Schmerler* (1944) 88 S.J. 415. In England the question is probably one of law rather than fact.

Hire purchase business comes within the exception: *Olds Discount Co., Ltd.* v. *Cohen* noted at [1938] 3 All E.R. 281; *Trade Protection Trust, Ltd.* v. *Young* (1940) 84 S.J. 646, and the sale of book debts does not constitute a moneylending transaction: *Olds Discount Co., Ltd.* v. *Playfair, Ltd.* [1938] 3 All E.R. 275. The present case which follows *Khoon's Official Assignee* v. *E. R. Liong Hin, Ltd.* [1960] A.C. 178, a decision under a similarly worded Ordinance of the Laws of Singapore, demonstrates that if stricter control of personal credit business is required it can only be obtained by legislation. The only restriction meantime upon credit sales is as to minimum deposit and maximum repayment periods: The Hire-Purchase and Credit Sale Agreements (Control) Order, 1960 (S.I. No. 762). *Cf. Napier, Ltd.* v. *Paterson*, 1959 J.C. 48.

[Report and commentary by ALISTAIR R. BROWNLIE, S.S.C.]

OBSCENE PUBLICATION

Obscene Publications Act, 1959, *s.* 2 (1)—" *offers for sale* "—*article displayed in shop window*

Mella v. Monahan

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Salmon and Winn JJ.: *The Times*, January 20, 1961.[3]

M. was convicted by the chief magistrate of offering for sale twenty-four packets of photographs, each packet containing five obscene photographs, contrary to section 2 (1) of the Obscene Publications Act, 1959.

On appeal the magistrate found that the packets of photographs were displayed in a shop window; that the top photograph of each packet was visible, the packets being made of cellophane wrapping; that a ticket was attached stating 10s. a packet of five photographs; and that M., who was employed as manager of the shop, told a police inspector that it was his job to sell the photographs.

Section 2 (1) of the Act provides that any person who " publishes " an obscene article shall be liable to certain penalties; and by section 1 (3) of the Act, " a person publishes an article who—(*a*) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire."

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[3] For M.: *Greville Janner* (instructed by M. Phillips & Co.). For the prosecutor: *J. S. Streeter* (instructed by Director of Public Prosecutions).

Held, allowing the appeal, following *Fisher* v. *Bell* (see below), that the packets of photographs were not " offered for sale " within the meaning of section 2 (1) of the Act.

Per Lord Parker C.J.: " The court has considered anxiously whether it was possible to distinguish this case in any way from *Fisher* v. *Bell*, but it was impossible to do so and, with equal reluctance, this appeal must be allowed."

Commentary. See the commentary on *Fisher* v. *Bell* (below, p. 180). Precisely the same considerations appear to apply to this case.

Obscene Publications Act, 1959—test of obscenity—ethical merits—comparison with other books—publication for public good—onus of proof

R. v. Penguin Books, Ltd.

Central Criminal Court: Byrne J.: October 20 to November 2, 1960.[4]

The defendant company was charged under section 2, Obscene Publications Act, 1959, with publishing an obscene article, namely, the novel *Lady Chatterley's Lover* by D. H. Lawrence. After the prosecution had opened the case and called formal evidence of publication, the defence opened their case and called some forty expert witnesses eminent in church, educational and literary circles to show that: (1) Lawrence's intention was to purify words descriptive of sexual matters and the description of sexual relations by bringing them to the light of day; (2) promiscuity gave no satisfaction, and that a permanent relationship between men and women who loved each other was essential to the cure of the sick society of England; (3) Lawrence achieved his object by describing with honesty and fairness the slow development of love between two persons who in the end were about to marry; and (4) the book was not obscene and that in any case its publication was in the public interest on the grounds laid down in section 4 of the Act.

The prosecution called no evidence in rebuttal, conceding the literary merit of the book and not challenging the honesty of purpose of the author.

During the course of the hearing the following rulings (*inter alia*) were given:

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[4] For the prosecution: *Griffith Jones* and *Morton* (instructed by the Director of Public Prosecutions). For the defence: *Gerald Gardiner, Q.C., Hutchinson* and *R. Du Cann* (instructed by Rubinstein, Nash & Co., London, W.C.1).

[redacted]

(1) It was not open to the defence to call evidence to the effect that all the author's works, including the book in issue, were on sale in all other civilised countries.

(2) The words "other merits" in section 4 (2) included ethical merits.

(3) It was not open to the defence to prove no intention to deprave or corrupt.

(4) The literary merits of the book in issue might be compared with the literary merits or demerits of other books but the comparison should not extend to the degree of obscenity of other books not prosecuted and constantly read.

(5) Publication for public good was a question for the jury not to be answered by expert witnesses.

In summing up his lordship instructed the jury that: They must consider the book as a whole, not selecting passages here and there and, keeping their feet on the ground, not exercising questions of taste or the functions of a censor. The first question, after publication, was: was the book obscene? was its effect taken as a whole to tend to deprave and corrupt persons who were likely, having regard to all the circumstances, to read it? To deprave meant to make morally bad, to pervert, to debase or corrupt morally. To corrupt meant to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile. No intent to deprave or corrupt was necessary. The mere fact that the jury might be shocked and disgusted by the book would not solve the question. Authors had a right to express themselves but people with strong views were still members of the community and under an obligation to others not to harm them morally, physically or spiritually. The jury as men and women of the world, not prudish but with liberal minds, should ask themselves was the tendency of the book to deprave and corrupt those likely to read it, not only those reading under guidance in the rarefied atmosphere of some educational institution, but also those who could buy the book for three shillings and sixpence or get it from the public library, possibly without any knowledge of Lawrence and with little knowledge of literature. If the jury were satisfied beyond reasonable doubt that the book was obscene, they must then consider the question of its being justified for public good in the interests of science, literature, art or learning or other subjects of general concern. Literary merits were not sufficient to save the book, it must be justified as being for the public good. The book was not to be judged by comparison with other books. If it was obscene then if the defendant had established the probability that the merits of the book as a novel were so high that they outbalanced the obscenity so that the publication was for the public good, the jury should acquit.

Verdict. Not guilty. No order for costs.

[C. B. ORR, *Barrister-at-Law*.]

Commentary. (1) The evidence that Lawrence's books, including this one, were on sale in all civilised countries except Britain and the Commonwealth was offered to establish the literary merits of the book but was rejected as being not the kind of evidence that the statute contemplates. While the statute expressly declares that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted (s. 4 (2)), this does not rule out the possibility of other relevant evidence being admitted. The evidence in question, however, may be thought to be only remotely relevant to the issue, particularly as it excepted the Commonwealth countries. Moreover, the witness to whom the question was addressed, an inspector of police, could hardly have known the answer from his own personal experience, and it would seem that his answer would have been hearsay. This same question was later put to a literary expert witness after the latter had stated that publication in most other Western countries would be an indication of the literary merits of the book. The witness answered the question before a ruling could be given whether this " groundwork " made the question admissible.

(2) The Bishop of Woolwich who had made a special study of ethics was called by the defence as an expert on the ethical merits of the book, and not as a literary expert. The admission of such evidence seems plainly to be justified by the use of the phrase, " other merits," in s. 4 (2). No doubt this phrase might be construed *ejusdem generis* with " literary, artistic, scientific . . . " and the other merits must be such as tend to establish that the publication of the article is for the public good: but evidence as to ethical merits should be disqualified on neither of these grounds.

(3) There appears to have been a good deal of confusion in the argument about " intent." The intent of the author in writing the book and the intent of another person in publishing it are clearly quite distinct matters and may well differ. They do not seem to have been kept entirely apart in the arguments. Much of the argument centred around the case of *R.* v. *de Montalk* (1932) 33 Cr.App.R. 182 where accused was both author and publisher. The judge's ruling, however, clearly relates to the intention of the defendants in publishing the book. Mr. Gardiner's rejected submission was that the prosecution must prove an intent to deprave and corrupt and that, if a man published an obscene article, the presumption that he intended the consequences of his acts was rebuttable. It seems to have been accepted, on the other hand, that the intention of the author may be relevant to the literary merit of the book. Mr. Griffith Jones expressly conceded this point during the argument and in his closing speech he told the jury that he had never challenged Lawrence's honesty of purpose.

In holding that no intention to deprave or corrupt need be proved, the court was applying to the Act the same principle which governed prosecutions for obscene libel at common law, as laid down in *de Montalk* and other cases. In the absence of some express alteration of the common law in the words of the statute, the result arrived at on this point was the one to be expected from an application of the ordinary principles of statutory interpretation. The cases on the point were criticised by Mr. N. St. John Stevas in "Obscenity and the Law" [1954] Crim.L.R. 817, as well as in his book of the same name. Mr. Stevas quoted, *inter alia*, a passage from the summing up of Stable J. in *R.* v. *Martin Secker and Warburg, Ltd.* [1954] 1 W.L.R. 1138, 1142–1143, in which that learned judge told the jury: "You will have to consider whether the author was *pursuing an honest purpose* and an honest thread of thought, or whether that was all just a bit of camouflage. . . ." But the italicised words relate to the intention of the author of the book who was not on trial and not to that of the publisher who was, so they hardly support the view contended for by Mr. Stevas that a specific intention to deprave and corrupt is part of the *mens rea* of the offence. On the contrary, Stable J.'s famous judgment contains no reference to any requirement of intention on the part of the publisher but states that the jury's task is to decide whether the tendency of the book is to deprave and corrupt.

(4) In *R.* v. *Reiter* [1954] 2 W.L.R. 638 the jury were asked to look at a large number of other books in order to decide whether the books, the subject of the charge, were obscene. The Court of Criminal Appeal said that that was "absolutely wrong." The present decision does not affect that ruling; but, since it may now be necessary to assess the literary merit of the book where the defence of public good is raised, evidence relating to other books may be admitted to establish the "climate of literature." It is not permissible to prove that other books which are equally as obscene as the one in issue are in circulation and have not been the subject of a charge. The distinction between these two possible purposes of the evidence relating to other books is, to say the least, somewhat subtle and may be difficult for juries to grasp.

(5) It is commonly stated as a general principle that witnesses may not give their opinion on the very question which the jury have to answer. In *Hollington* v. *Hewthorn & Co., Ltd.* [1943] K.B. 587 Lord Goddard C.J. said of a witness in a running down case who had had a complete and full view of an accident: "It is beyond question that, while he may inform the court of everything he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth it is because his opinion is not relevant." That this is the true explanation appears from the fact that expert witnesses, whose opinions are relevant, may express their views on the very question that the jury has to decide; *e.g.*, whether the accused who has raised the defence of insanity knew the nature and quality of his act when he did it. Similarly with non-expert witnesses where there is an exception to the rule excluding an opinion; so where the only question for the jury is one of identity, a witness who observed the incident may give his opinion whether it was or was not the defendant who did the act. It is respectfully submitted that the ruling in the present case was correct. The witnesses were experts in literature or ethics and on these matters their opinions were admissible; but they were not experts on what is for the public good and the general rule excluding opinions therefore applied.

The judge's summing up made it clear that the onus of establishing the defence of public good, placed by section 4 (1) on the defence, is proof on a balance of probability. This is in accordance with the general rule where statute puts the onus on the accused. *R.* v. *Carr-Briant* [1943] K.B. 607.

OFFENSIVE WEAPONS

Restriction of Offensive Weapons Act, 1959, *s.* 1—*" offers for sale " —weapon displayed in shop window*

Fisher v. Bell

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ.: [1960] 3 W.L.R. 919.[5]

B. kept a retail shop in Bristol. A police constable, walking past the shop, saw in the window, amongst other articles, a flick knife. Behind the knife was a ticket with the words " Ejector knife, 4s." The police officer went into the shop and informed B. that he would be reported for offering the knife for sale, to which B. replied: " Fair enough."

B. was charged with unlawfully offering for sale a knife which had a blade which opened automatically by hand pressure applied to a device attached to the handle of the knife, contrary to section 1 of the Restriction of Offensive Weapons Act, 1959.

Section 1 (1) of the Act provides: " Any person who manufactures, sells or hires or offers for sale or hire, or lends or gives to any other person—(*a*) any knife which has a blade which opens automatically by hand pressure . . . attached to the handle of the knife, sometimes known as a ' flick knife ' or ' flick gun ' . . . shall be guilty of an offence."

The justices dismissed the information. On appeal by the prosecutor: —

Held, dismissing the appeal, that the knife had not been " offered for sale " within section 1 of the Act.

Per Lord Parker C.J.: " Any statute must be looked at in the light of the general law of the country, and Parliament in its wisdom in passing an Act must be taken to have known how the law had interpreted certain words. It was clear that according to the ordinary law of contract, the display of an article with the price upon it in a shop window was merely an invitation to treat, not an offer for sale, the acceptance of which constituted a contract. That was the general law of the country. Not only that, but it was to be observed that in many statutes and orders, which prohibited selling and offering goods for sale, it was very common to insert the words 'offering and exposing for sale,' the words 'exposing for sale' covering the display of goods in shop windows." [D. C.]

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[5] For the prosecutor: *J. A. Cox* (instructed by Robins, Hay & Waters). For B.: *Paul Chadd* (instructed by Haslewoods, for Cooke, Painter, Spofforth & Co.).

Commentary. In *Pharmaceutical Society of Great Britain* v. *Boots* [1953] 1 Q.B. 401 it was held by the Court of Appeal that the display of goods on the shelves in a self-service shop is not an offer to sell the goods. The offer is made by the customer when he tenders the goods to the cashier, who is then free to accept or reject it. Remarkably enough, there is no reported decision, until the present case, as to the effect of goods displayed in a shop window. The general opinion, however, is that such display is not, in ordinary circumstances, an offer to sell the goods. ". . . the shopkeeper impliedly reserves to himself a right of selecting his customer. A shop is a place for bargaining, not for compulsory sales": Winfield, "Some Aspects of Offer and Acceptance" (1939) 55 L.Q.R. 499. Though this is probably the better view, is has not gone unchallenged: "The approach of Winfield overlooks the moral rights of the prospective customer. Surely he should not be lured into shops by statements in the window, which to any reasonable person appear to be offers, only to be met with the reply of the shopkeeper that the particular article is not for sale at that price, or to him, as the case may be": Ellison Kahn, 72 *South African Law Journal*, 251. This approach suggests the possibility of a different answer for the goods in the window from that given by the Court of Appeal for goods in a self-service shop. The answer to the question depends not upon the logical application of any settled principle, but upon considerations of policy and convenience; and it has been held elsewhere that the display of goods in a shop window is an offer: a Polish woman successfully brought an action against the State trade network in Katowice for refusing to sell her a dress displayed in the window of one of its shops: *The Times*, May 26, 1959.

Perhaps it was not, then, so clear as the court in the present case seemed to assume that the "principles of general contract law" required a finding that there was no offer in the contractual sense; but, even accepting (as is probably the case) that that was the right view of the law of contract, it is respectfully submitted that it by no means follows that there was no "offer" for the purposes of the present statute. "A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the word-book": O. W. Holmes J., "The Theory of Legal Interpretation," 12 Harv.L.Rev. 417. It is common enough for the same word to be given different meanings in different statutes and the phrase "for the purposes of this statute" is commonly to be found in judgments dealing with problems of statutory interpretation. "The same word may be used in different senses in the same statute and even in the same section": Maxwell, *Interpretation of Statutes*, 323.

There was no reason, then, why the court could not have conceded that this was not an offer for the purposes of the formation of a contract and yet held that it was an offer within the meaning of that word in this particular statute. The common meaning of the word is wider than that which it bears in the law of contract. Thus, an auctioneer is commonly said to offer goods for sale; yet every beginner in the law of contract knows that he is only issuing an invitation to treat. It might well have been held that the mischief at which the statute is aimed demanded that this wider meaning be given to the word. In so holding the court would have been simply following an approach adopted in several recent cases: *Smith* v. *Hughes* [1960] 1 W.L.R. 830; *Casino de Paris, Ltd.* v. *Newberry* [1960] Crim.L.R. 836; Crim.C. & C. 109.

The second reason given by the court—that other similar statutes use the words " exposing for sale " and that this statute did not do so—is a more convincing ground for the decision, though not a decisive one.

A possibility which does not seem to have been canvassed is that, on these facts, the accused might be convicted of an attempt to commit an offence under the section. No doubt this was because there is no power to convict of an attempt, on a charge of the complete crime, in a court of summary jurisdiction; the Criminal Procedure Act, 1851, s. 9, only applies to trial on indictment. *Cf. Pender* v. *Smith* [1959] 2 Q.B. 84. Moreover, if there was an attempt at all, it was an attempt to *sell* (which was not charged) and not an attempt to offer; the offer would have come from the prospective customer. It may well be, however, that a man who invites offers to buy a specific thing at a stated price is attempting to sell it, for it is clearly his intention to do so and his acts might be regarded as having got beyond the stage of preparation and be sufficiently proximate to the completed crime. *Cf. Gardner* v. *Akeroyd* [1952] 2 Q.B. 743 and *Hope* v. *Brown* [1954] 1 W.L.R. 250. The court was very dissatisfied with the result at which it felt obliged to arrive and it may be that, in the absence of amending legislation, a charge of attempt to sell will fill the *casus omissus*.

ROAD TRAFFIC

Causing death by dangerous driving—culpable homicide—Scots law —directions to jury

Dunn v. H.M. Advocate

High Court of Justiciary: Lord Justice-Clerk (Thomson), Lords Patrick and Strachan: 1960 S.L.T.(Notes) 74.[6]

D. was charged on indictment with culpable homicide arising out of his driving a motor-car while under the influence of drink, and alternatively, with offences under the Road Traffic Act, 1956, s. 8 (1), and Road Traffic Act, 1930, s. 15. The drink charges were not made out and accused was convicted of the section 8 (1) offence. He appealed against conviction, arguing that the requirements for the common law crime were almost indistinguishable from those of the statutory offence, any distinction had not been made clear to the jury, and acquittal on the former should therefore involve acquittal on the latter charge.

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[6] For the appellant: *Daiches, Q.C., Sutherland* (instructed by Alan McDougal & Co., s.s.c.). For the Crown: *Wylie, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

Held, that there is a real distinction and adequate directions were given to the jury.

Commentary. Scots law requires "gross or wicked or criminal negligence, something amounting or at any rate analogous to a criminal indifference to consequences before a jury can find culpable homicide proved": *Paton* v. *H.M. Advocate*, 1936 J.C. 19, *per* Lord J. C. Aitchison, at p. 22; *H.M. Advocate* v. *Cranston*, 1931 J.C. 28. This compares with the requirement of English law that the negligence "went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment": *R.* v. *Bateman* (1925) 19 Cr.App.R. 8 *per* Lord Hewart C.J. at p. 11; applied in *Andrews* v. *D. P. P.* [1937] A.C. 576. To facilitate convictions the 1956 Act introduced the statutory offence—see Gower's article in 1960 J.For.Sc.Soc. 1, 33—objective in nature and for which *mens rea* is irrelevant: *R.* v. *Scates* [1957] Crim.L.R. 406; *R.* v. *Johnston* [1959] Crim.L.R. 430; Glanville Williams, *The Criminal Law*, The General Part, § 30. The essential requirements of proof are that the accused did a dangerous thing and that this was the substantial cause of death: *R.* v. *Curphey* [1957] Crim.L.R. 191. English law is unfortunately still equivocal as to the admissibility of evidence of drink: *R.* v. *Richardson* [1960] Crim.L.R. 135; or urine alcohol content: *R.* v. *Norrington* [1960] Crim.L.R. 432 where section 15 is not invoked. The Scottish practice of excluding such prejudicial evidence as irrelevant is to be commended; but results of a medical examination made in relation to a section 15 charge were held admissible in a prosecution for culpable homicide where a death was subsequently found to have resulted: *McKie* v. *H.M. Advocate*, 1958 S.L.T. 152.

[Report and commentary by ALISTAIR R. BROWNLIE, S.S.C.]

SCOTS LAW

Breach of the peace—review—"harsh and oppressive"—sentence in prisoner's own interest

McCreadie v. H.M. Advocate

High Court of Justiciary: Lord Justice-Clerk (Thomson), Lords Patrick and Mackintosh: November 22, 1960.[7]

M., an alcoholic, was indicted upon two charges of disorderly conduct and obscene and threatening language constituting breaches of the peace. He pleaded guilty, admitting twenty-six previous convictions for similar offences, and was sentenced to twelve months imprisonment.

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[7] For the appellant: *Cullen* (instructed by Alistair R. Brownlie, S.S.C.). For the Crown: *Cowie, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

Held, dismissing his appeal against sentence, that the sentence was not harsh and oppressive and was in his own interest.

Commentary. Breach of the peace in Scotland is usually treated as a minor offence and prosecuted summarily in the police courts where the maximum punishment is 60 days' imprisonment: Summary Jurisdiction (Scotland) Act, 1954, s. 3. In *O'Reilly* v. *H.M. Advocate*, 1943 J.C. 23, Lord Justice-General Normand held that in the absence of aggravating circumstances a sentence on indictment which went beyond what was necessary and habitual and erred on the side of severity was harsh and oppressive and fell to be reduced. The test in summary cases is more stringent; see *Stewart* v. *Cormack*, 1941 J.C. 73, where oppression was defined as disregard of the essentials of justice and infliction of a penalty unrelated to the crime: *cf.* 1958 S.L.T.(News) 49. The sentence here imposed seems unusually severe by comparison with the average, but the appeal court thought that the judge of first instance may have had in view that an enforced period of abstinence from alcohol might be beneficial in the particular circumstances and might prevent recurrences. This illustrates the tendency of the court to assume the role of medical adviser imposing what amounts to treatment considered likely to benefit the offender which medical authorities in the absence of certification or consent would have had no power to impose of themselves on a voluntary patient. However understandable, the principle is thought to be a bad one. The use of probation to secure treatment—untried on any of the twenty-seven opportunities presented by this offender—was rejected in *H.M. Advocate* v. *D.*, 1944 J.C. 132, but protection of the public was a greater factor in that case.

Dr. Glanville Williams discriminates between imprisonment with punitive intent and imprisonment with a view to medical supervision of the offender: 1 Med.Sci. & L., p. 51. This may be unsatisfactory in cases such as *R.* v. *Cooper* [1960] Crim.L.R. 371 where a thief suffering from mental illness was given three years' imprisonment in his own interest, or *R.* v. *Tickell*, *The Times*, January 24, 1958, where a schizophrenic matricide was sentenced to life imprisonment in his own interest, or *R.* v. *Rowley*, *The Times*, July 19, 1960, where a schizophrenic mother convicted of manslaughter was sentenced to life imprisonment because she was in need of mental treatment, each sentence being based upon the same legal provisions as would support punitive imprisonment. If the alcoholism amounted to mental disorder and this were proved to the court, the appellant could when the Act comes into force be committed to hospital for detention under section 55 of the Mental Health (Scotland) Act, 1960, by which greater powers were conferred than those under the Criminal Justice (Scotland) Act, 1949, s. 3. If his condition did not amount to mental disorder it is even more unsatisfactory that he should be subjected to lengthy imprisonment and the court may have been adversely impressed by the alcoholism factor as in *R.* v. *O'Malley* noted at [1958] Crim.L.R. 402. From the practical viewpoint there is little to be said for burdening the prisons with those alcoholics who are a greater menace to themselves than to society.

[Report and commentary by ALISTAIR R. BROWNLIE, S.S.C.]

Moneylenders Act, 1927—moneylending in course of retail business

See MacDonald *v.* N. G. Napier, Ltd., above, p. 174.

Road traffic—causing death by dangerous driving—culpable homicide

See Dunn *v.* H.M. Advocate, above, p. 182.

SENTENCE

Breach of the peace — " harsh and oppressive " — sentence in prisoner's own interest—Scots law

See McCreadie *v.* H.M. Advocate, above, p. 183.

TRIAL

Jury—ambiguous direction given on question of unanimity

R. v. Davey and Davey

Court of Criminal Appeal: Pilcher, Paull and Fenton Atkinson JJ.: October 17, 1960: [1960] 1 W.L.R. 1287.[8]

The appellants were convicted at the Central Criminal Court of conspiracy with five other persons to cheat and defraud the creditors of some fourteen companies. One of the appellants was convicted also on other charges. On the question of the unanimity of the verdict the jury were directed in the summing-up as follows: " Sometimes in the past judges used to tell the juries that they have to be unanimous, but I always say—and it is true—you all have to agree before you can find anybody guilty, and there is no reason I know of why any judge should worry about that, from my experience, because whereas in lots of your own affairs, on committees, you do not always agree, nevertheless those of you who have experience of board meetings may find that again and again agreement is reached and no vote is taken, and hardly ever is a vote taken at a board meeting, and juries seriously realising what they are doing are united by a passion for the right verdict, a passion for stern or real justice, if you like, and the result I should think is that in ninety-nine cases out of one hundred there is not a disagreement at all, but solidarity and sense." On appeal to the Court of Criminal Appeal:

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[8] For the appellant E. C. Davey: *W. A. Sime, Q.C., J. W. A. Sloss* (instructed by the Registrar, Court of Criminal Appeal). For the appellant O. M. Davey: *E. O. Sutcliffe, Q.C., Edward Eyre* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Malcolm Morris, Q.C., Sidney Noakes* (instructed by the Director of Public Prosecutions).

Held, allowing the appeal, that this court had given very careful consideration to the passage from the summing-up [cited above] dealing with the need for unanimity. It seemed to the court that it was ill-expressed, in some respects contradictory and extremely difficult to understand. But the ordinary juror listening attentively might be left with the impression that the necessity for unanimity of view had now been in some measure relaxed and was no longer of such importance as it used to be in the past. The jurors might also have thought that they were entitled to regard themselves more as being in the position of committee men or members of a board of directors and might achieve unanimity by a juror sinking his own view without amending it and agreeing with the majority of his colleagues, although he himself was still of an opinion contrary to the majority or in a state of uncertainty. This course was not permissible to a juror who had taken a personal oath to render a true verdict according to the evidence. There had to be discussion, of course, when a jury retired to consider its verdict and, during the discussion, a juror might be satisfied that the view originally held by him was wrong or his doubts might be resolved. But a member of a committee might allow a majority decision to be made whilst still holding his own view; or he might abstain from voting if a vote was taken. The principles on which the question of unanimity should be approached had been set out in *R.* v. *Mills* (1939) 27 Cr.App.R. 80, and in *R.* v. *Walhein* (1952) 36 Cr.App.R. 167. In the latter case Lord Goddard C.J. had said that jurors often had to be reminded that, after discussion, they might " subordinate their views " to those of the majority. In the opinion of this court the phrase " subordinate their views " meant that jurors might come to a different conclusion after proper discussion, and did not mean that they might sink their views in order to achieve unanimity. In the present case it was more than possible that the jury, after such a direction, had arrived at this verdict without a true appreciation of their duty. Accordingly the appeals would be allowed.

A further point was that the conspiracy count was, in the opinion of this court, bad in law. It charged seven persons over a period of years with conspiring to defraud. Some of the persons charged had nothing to do with some of the companies involved, and some of the companies had been wound up before some of the persons charged with conspiracy had appeared on the scene. It was a " rolled up " charge and contrary to the decisions in

R. v. *West* (1948) 32 Cr.App.R. 152, and *R.* v. *Dawson* (1960) 44 Cr.App.R. 87. As the appeals were being allowed on the question of misdirection it was unnecessary to consider the further question of whether the conspiracy charge was also fatal, but it might well have vitiated the convictions on the other charges by reason of the introduction of evidence which would not otherwise have been admissible. [H. P.]

Commentary. The cases concerning the proper direction on the requirement of unanimity are considered by Dr. Glanville Williams in *The Proof of Guilt* (2nd ed.) 278 *et seq*. See also, Sir Patrick Devlin, *Trial by Jury*, 48 *et seq*., and *R.* v. *Rossi* [1957] Crim.L.R. 258–259. The present case appears to settle what was in fact a conflict of authority between *Mills* and *Walhein* in favour of the former. It is respectfully submitted that the right conclusion was reached.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Burglary

In R. *v*. ROOK the court (Hilbery, Ashworth and Elwes JJ.: January 13, 1961) varied a sentence of three years' corrective training to one of eighteen months' imprisonment. R. had pleaded guilty to breaking into licensed premises in the night with intent to steal therein. R., who was a man of thirty-four years of age, had six previous convictions, of which four (taking motor-car without consent, shopbreaking, larceny and embezzlement) were for offences of dishonesty. The court stated that R. was a man who had for many years pursued his occupation, that of a lorry driver. One would, therefore, hesitate before passing a sentence of corrective training on the ground that R. did not need training. The offence was a serious one and imprisonment was undoubtedly deserved. The appropriate sentence was one of eighteen months' imprisonment.

Housebreaking

In R. *v*. NAUGHTON the court (Barry, Hinchcliffe and Paull JJ.: January 11, 1961) reduced a sentence of seven years' preventive detention to one of twelve months' imprisonment. N. had pleaded guilty at quarter sessions to breaking into a vicarage and stealing therein an offertory box containing about £1. N., who was a man of thirty-nine years of age, had thirteen previous convictions for dishonesty. On his last conviction in 1954 he had been sentenced to seven years' preventive detention, from which sentence he was released in July 1960. The present offence was committed ten days after his release. The court stated that one of the facts of this case was that N., having committed the offence, voluntarily went to the police station, gave himself up and explained to the police that he had fallen to this temptation. It was not right that for this one offence, committed in those circumstances, N. should be sent back to a further seven years' preventive detention. The fair and proper way to approach this case was to sentence him for the present offence only; and the appropriate sentence was one of twelve months' imprisonment.

Larceny (Breach of Probation)

In R. *v.* MARSH the court (Barry, Hinchcliffe and Paull JJ.: January 11, 1961) reduced a sentence of two years' imprisonment to one of twelve months' imprisonment. M. had been dealt with by quarter sessions for breach of probation. M. was a man of twenty-eight years' of age with a number of previous convictions, for which he had been sent to borstal training and had served six sentences of imprisonment. The probation order in question was made on conviction for larceny of a motor-vehicle in December 1957 and M. committed two further offences (stealing bicycles), constituting the breach of probation, in June 1960. The court stated that, if the two further offences had been committed earlier during the probation period, no possible complaint could have been made against the sentence of two years' imprisonment. However, having regard to the lapse of two-and-a-half years during which M. kept out of trouble and to the minor nature of the further offences, the appropriate sentence was one of twelve months' imprisonment.

Acts and Orders[*]

Animals

The principal Order (S.I. 1948, No. 423) is varied. The principal Order applied to visible infestation by warble-fly, and this is now extended to infestation discoverable by touch. A variation is also made in the specification of the dressing which is required to be applied to infested cattle. WARBLE FLY (DRESSING OF CATTLE) (ENGLAND AND WALES) (SCOTLAND) (AMENDMENT) ORDERS, 1960 (S.I. Nos. 2392, 2408) (each 3d.). Both operative December 29, 1960.

For penalties for contraventions, see section 7 of the Diseases of Animals Act, 1950.

Betting and Gaming

Regulations have been made setting out the requirements to be observed by the holder of a betting office licence in respect of licensed betting premises. The premises must be closed between the hours of 6.30 p.m. and 7 a.m. (Reg. 1); Regulation 2 makes provision as to the display of notices and other written matter and signs on premises giving access to a betting office; Regulation 3 makes provision as to the display of notices and other written matter and signs inside a betting office. Operative May 1, 1961. BETTING (LICENSED OFFICES) REGULATIONS, 1960 (S.I. No. 2332) (3d.).

For penalties for contraventions, see section 5 of the Betting and Gaming Act, 1960.

The forms to be used in connection with the authorisation and registration of agents by bookmakers and the Racecourse Betting Control Board under section 3 of the Betting and Gaming Act, 1960, have been prescribed by the BETTING (BOOKMAKERS' AGENTS) REGULATIONS, 1960 (S.I. No. 2333) (3d.). Operative June 1, 1961.

Civil Aviation

These Regulations are made under the Civil Aviation (Licensing) Act, 1960, and include in particular provision for (a) the exemption of flights for certain purposes from the requirement of an air service licence under the Act (Reg. 3); (b) the form and manner of applying for the grant, variation, revocation and suspension of a licence; (c) consultations and hearings by the Air Transport Licensing Board (Regs. 8, 10, 11); (d) the conditions which the Board may include in a licence and the circumstances in which they may or shall dispense with a provision in a licence as to tariffs (Regs. 12, 13); (e) appeals to the Minister from decisions of the Board (Reg. 14); (f) fees to be paid (Reg. 1 and Second Schedule); (g) the provision to the Minister and the Board of various statistical and other information by licence holders (Reg. 18); (h) the setting up of regional advisory committees for Scotland, Wales and Northern Ireland to advise the Board (Reg. 20). Operative December 1, 1960. CIVIL AVIATION (LICENSING) REGULATIONS, 1960 (S.I. No. 2137) (9d.).

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[*] Prepared by F. Maurice Drake, *Barrister-at-Law.*

Criminal Procedure

The Criminal Appeal Rules, 1908, are applied to proceedings in the Court of Criminal Appeal preliminary or incidental to an appeal from the Court of Criminal Appeal to the House of Lords under section 1 of the Administration of Justice Act, 1960, subject to the modifications set out in the Schedule. The main modification is that an application to the Court of Criminal Appeal for leave to appeal, or to extend the time for appealing, or for legal aid, or to be present at the hearing of such an application must be made orally at the conclusion of the trial in the Court of Criminal Appeal or in the form prescribed in the Annex to the Schedule to these Rules (Rule 1).

Rule 2 authorises the Court of Criminal Appeal to release on bail a person appealing to the House of Lords from an order or decision of the court in the exercise of its jurisdiction to punish for contempt of court. Operative January 1, 1961. CRIMINAL APPEAL (No. 2) RULES, 1960 (S.I. No. 2325) (3d.).

Rules have been made consequential on the provisions of the Administration of Justice Act, 1960, relating to appeals from a Divisional Court of the Queen's Bench Division in criminal cases, to appeals in cases of contempt of court and to applications for habeas corpus.

Rule 2 amends the procedure on applications for attachment or committal for contempt of court and requires the application to be heard in open court except in certain cases in which the court may sit in private. Rule 4 makes provision for appeals to the Court of Appeal in contempt cases and for the release on bail of a person appealing to the Court of Appeal or from that court to the House of Lords. Corresponding provision for appeals to a Divisional Court is made by the new rules 36C and 36D added to Order 59. The new rule 36B in Order 59 deals with the procedure on certain applications connected with appeals from a Divisional Court of the Queen's Bench Division to the House of Lords in a criminal cause or matter. Rule 5 makes the necessary amendments relating to applications to a Divisional Court for habeas corpus or one of the prerogative orders, while the effect of Rule 7 is that even in vacation a Divisional Court must consist of not less than two judges. Rule 8 makes minor amendments in the procedure relating to applications for bail. Operative January 2, 1961. RULES OF THE SUPREME COURT (No. 4), 1960 (S.I. No. 2327) (4d.).

Food and Drugs

Regulations made under the Food and Drugs Act, 1955, and the Food and Drugs (Scotland) Act, 1956, (a) impose requirements as to the labelling and advertising of certain "specified foods" (described in Reg. 2), which have the appearance of milk, condensed milk or dried milk and which contain skimmed milk and non-milk fat, but exempt the foods named in Part I of the Second Schedule from the requirement to bear on the label the declaration "Unfit for Babies" (or the permitted alternatives) provided that the composition of the food is as prescribed in Part II of that Schedule; (b) prohibit (subject to certain savings) the labelling or advertising of the specified foods and beverages containing skimmed milk, in a manner suggestive of milk or anything connected with the dairy interest; and (c) provide that the Condensed Milk Regulations, 1959 (S.I. 1959, No. 1098), and the Public Health (Dried Milk) Regulations, 1923 to 1948 (and their Scottish alternatives), shall not apply to any specified food. SKIMMED MILK WITH NON-MILK FAT REGULATIONS, 1960; (SCOTLAND) REGULATIONS, 1960 (S.I. Nos. 2331 and 2437) (each 6d.) Both operative September 19, 1961.

For penalties for contraventions, see Regulation 7 of these Regulations.

The maximum amount of arsenic permitted in brewer's yeast intended for use by manufacturers in the manufacture of yeast products has been increased from 2·0 to 5·0 parts per million. Operative December 14, 1960. ARSENIC IN FOOD (AMENDMENT) REGULATIONS, 1960; (SCOTLAND) AMENDMENT REGULATIONS, 1960 (S.I. Nos. 2261 and 2344) (each 3d.).

Seasonal increases are made in the permitted maximum price of milk in England and Wales, Scotland and Northern Ireland. Both Orders operative January 1, 1961. MILK (GREAT BRITAIN);

MILK (NORTHERN IRELAND) (AMENDMENT NO. 2) ORDERS, 1960 (S.I. Nos. 2251, 2252) (each 3d.).

London Traffic

The following Orders have been made prohibiting waiting: S.I. Nos. 2319 (Hoddesdon) (3d.); 2320 (Leatherhead) (3d.).

The following Orders have been made detailing prescribed routes: S.I. Nos. 2260 (Westminster) (2d.); 2321 (Wimbledon) (3d.); 2405 (Finsbury and Islington) (2d.); 2406 (City of London) (3d.); 2455 (Hammersmith) (2d.).

The following Order has been made prohibiting cycling in pedestrian subways: S.I. 2456 (Brentford and Chiswick) (3d.).

Parking places with parking meters are authorised in the Borough of St. Pancras. The location of these places, the times, periods and days during which vehicles may be parked there, the types of vehicles which may be parked there and the charges which the Borough Council may make, together with the general operation of the scheme, are set out in the Order and Schedule. Operative, for preliminary purposes to enable the Council to acquire the sites and prepare them for use, December 20, 1960, and fully operative March 20, 1961. PARKING PLACES (ST. PANCRAS) (NO. 1) ORDER, 1960 (S.I. No. 2322) (1s. 3d.).

Merchandise Marks

The principal Order (S.R. & O. 1929, No. 1203) as amended, is further amended by (1) prohibiting the importation into as well as the sale or exposure for sale in the United Kingdom of certain implements and tools falling within the descriptions specified in the principal Order, unless they bear an indication of origin; and (2) providing for the indication of origin to be applied to containers in which and to cards on which, an article is imported, sold or exposed for sale. Operative December 22, 1961. MERCHANDISE MARKS (IMPORTED GOODS) NO. 1 ORDER, 1960 (S.I. No. 2411) (3d.).

For penalties for contraventions, see section 5 of the Merchandise Marks Act, 1926.

National Insurance

The Police Pensions Act, 1948, and the regulations made thereunder, are modified in connection with the operation of the provisions of the National Insurance Act, 1959. The new Regulations apply to awards other than supplemental pensions, granted under the Police Pensions Regulations, on a person ceasing to be a regular policeman on or after April 3, 1961. NATIONAL INSURANCE (MODIFICATION OF THE POLICE PENSIONS PROVISIONS) REGULATIONS, 1960 (S.I. No. 2289) (6d.); (SCOTLAND) REGULATIONS (S.I. No. 2286) (4d.).

Pests

The restrictions imposed by the Importation of Plants Order, 1955, on the importation into England or Wales of certain raw vegetables from specified districts of Belgium, France, Italy and the Netherlands are modified for specified periods of 1961. Operative March 1, 1961. IMPORTATION OF RAW VEGETABLES ORDER, 1961 (S.I. 1961, No. 20) (3d.).

Police

Certain increases are provided for in the rates of detective duty allowance for constables, and the pay of constables and supplementary payments for them on the completion of 17 and 22 years' service. The supplementary rent allowance is continued for a further three years. The increased rates of pay and detective duty allowance take effect from September 1, 1960. POLICE (SCOTLAND) AMENDMENT (NO. 3) REGULATIONS, 1960 (S.I. No. 2404) (3d.).

See also under **National Insurance,** above, p. 192.

Public Health

The Public Health (Aircraft) and (Ships) Regulations, 1952 and 1954, are amended, the principal changes being (1) the definitions of " excepted area " and " excepted port " are extended to include the Federal Republic of Germany and Italy. Ships and aircraft coming from these areas are not required to comply with certain requirements of the regulations unless the port or airport medical officer considers that compliance is necessary on account of danger to public health; (2) the references to the International Sanitary Regulations are altered to take account of amending regulations adopted by the World Health Assembly since the main regulations were adopted in 1951; (3) the exemption for ships and aircraft forming part of the armed forces of certain countries is extended to include those of the armed forces of any Commonwealth country and any other country to which the Visiting Forces Act, 1952, has been applied, and (4) in the case of aircraft the declaration of health required on the arrival of an aircraft is to include details of persons on board known to be suffering from any illness (other than air-sickness or the effect of accidents), and of any such persons who have disembarked during the flight. Such declarations may be signed by members of the crew deputed to act on behalf of the commander. PUBLIC HEALTH (AIRCRAFT) AND PUBLIC HEALTH (SHIPS) (AMENDMENT) REGULATIONS, 1961 (S.I. Nos. 12 and 13) (each 3d.). Both operative January 17, 1961.

For penalties for contraventions see section 143 of the Public Health Act, 1936.

Road Traffic

Regulation 5 of the principal Order (which prescribes the diseases and disabilities in respect of which persons are precluded from claiming driving tests) is amended, the principal changes being that in future the following diseases and disabilities are added to those already prescribed, namely (1) mental disorder, as defined by the Mental Health Act, 1959, for which the applicant is liable to be detained under that Act, or is receiving treatment as an in-patient in a hospital or nursing home; and (2) severe abnormality, as defined by that Act, as a result of which the applicant is subject to guardianship under that Act, or is either resident in accommodation provided by, or is otherwise receiving care from, a local health authority. Operative January 2, 1961. MOTOR VEHICLES (DRIVING LICENCES) (AMENDMENT) (NO. 2) REGULATIONS, 1960 (S.I. No. 2336) (3d.).

Scotland

The Mental Health (Scotland) Act, 1960, by section 117 provides that its provisions shall come into operation on a day to be appointed by the Secretary of State. For the purposes of section 1 of that Act which relates to the cessation of the effect of certain provisions of the Lunacy (Scotland) Acts, 1857–1913 and the Mental Deficiency (Scotland) Acts, 1913 and 1940, this Order fixes the appointed day as January 1, 1961. MENTAL HEALTH (SCOTLAND) ACT, 1960 (APPOINTED DAY) ORDER, 1960 (S.I. No. 2296) (2d.).

There is to be no close season for grey seals in Scotland, other than in certain excepted areas, during the period of twelve months next following the making of this Order, which was made on December 5, 1960. The effect is to continue during that time the position created by a similar Order last year (S.I. 1959 No. 2078), except that it will not be lawful to kill grey seals by clubbing. The killing of grey seals during the period will be prohibited except by persons holding permits granted by the Secretary of State for Scotland. Operative December 5, 1960. GREY SEALS PROTECTION (SCOTLAND) (SUSPENSION OF CLOSE SEASON) ORDER, 1960 (S.I. No. 2272) (3d.).

For penalties for contraventions, see section 2 of the Grey Seals Protection Act, 1932.

Theatre and Cinematograph

Earlier regulations are consolidated and amended, mainly in order to take account of amendments in the law introduced by the Cinematograph Films Act, 1960. The main changes made by these regulations are (1) a person authorised under the provisions of section 161 (1) (*b*) of the Companies Act, 1948, to be appointed as auditor of a company may now verify the particulars of salaries, etc., furnished in Registration Form C; (2) a time limit of seven days is prescribed for furnishing to exhibitors notices of corrections in the Register; (3) persons duly authorised by the company, as well as the secretary or a director, may now make statutory declarations on its behalf; (4) changes are made in Registration Form C. Operative January 1, 1961. FILMS (REGISTRATION) REGULATIONS, 1960 (S.I. No. 2291) (9d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 *New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

77. *Larceny of tame rabbits from a hutch—felony at common law or summary offence*

"A" keeps a number of tame rabbits in hutches situate in his garden and his reason for keeping these animals is to sell them as food for man and not as pets or for show purposes. "B" steals twelve of these rabbits from the hutches of "A" and the offence is later detected. For the purposes of a prosecution, should "B" be charged with (a) larceny at common law, punishable as simple larceny by the provisions of section 2 of the Larceny Act, 1916, or (b) the summary offence of larceny of animals contrary to section 21 of the Larceny Act, 1861?

Section 21 of the Larceny Act, 1861, provides that "whosoever shall steal any bird, beast or other animal ordinarily kept in a state of confinement or for any domestic purpose, not being the subject of larceny at common law, or shall wilfully kill any such bird, beast or animal, with intent to steal the same or any part thereof . . . (shall) be imprisoned for any term not exceeding six months. . . ." According to Stone's *Justices' Manual*, 92nd ed., at p. 1531, footnote (d): "all valuable domestic animals, such as horses and domestic animals or birds which serve for food, as swine, poultry, and their products as eggs, milk and the flesh of such as are *ferae naturae* may be the subject of larceny at common law. The birds, beasts and animals which are not the subject of larceny at common law and are within the statute (the Larceny Act, 1861) when in the state described are bears, foxes, monkeys, apes, polecats, ferrets, thrushes, singing birds in general, parrots and squirrels and others possibly kept for whim, profit or pleasure, as hawks, badgers, herons, falcons, goats, rooks,—for all these are *ferae naturae* and although reclaimed, do not serve for the food of man."

It is suggested that the ejusdem generis rule would apply in the case quoted in the question, in that rabbits, when kept in confinement, are ordinarily kept for whim, profit or pleasure, *viz.*, as pets or for show purposes, and therefore they should be included with the examples of animals shown as not being larcenable at common law. The fact that in one particular case, a person keeps his tame rabbits solely for sale as food, should, it is submitted, be immaterial in considering the general issue. Otherwise, it would appear that an anomalous position would often arise, for example in the case of a man who had a goat stolen. This animal is not larcenable at common law, but is subject to section 21 of the Larceny Act, 1861, but because the owner stated that he kept this particular animal primarily for its milk yield, this would alter the offence to a felonious larceny at common law.

If the rule applies, then it would follow that larceny of tame rabbits in the circumstances described in the question, is contrary to section 21 of the Larceny Act, 1861, and not the common law with the punishment provided by section 2 of the Larceny Act, 1918, as this section applies solely and specifically to "stealing for which no special punishment is provided under this or any other Act for the time being in force." Your learned opinion would be appreciated. [D. A. R.]

ANSWER

In the absence of any authority on the point I agree that rabbits are not the subject of larceny at common law, and fall within the scope of the provisions of section 21 of the Larceny Act, 1861. I must confess, however, that I am a little doubtful whether the domestic tame rabbit is not to be placed in a wholly different category from its wild cousin, and unlike the wild cousin, considered *mansuetae naturae*. But without such authority I do not think these doubts can overweigh the fact that rabbits as such are undoubtedly *not* the subject of larceny at common law; and there is much force in your argument that difficulties would arise if a rabbit were or were not to be larcenable at common law according to the purpose for which it was kept by its particular owner.

I therefore agree that larceny of tame rabbits should, in all circumstances, be made the subject of a charge under section 21 of the Larceny Act, 1861. [F. M. D.]

78. *Sentence—eligibility for corrective training—whether previous convictions were on two separate occasions*

A, an adult, appeared at a magistrates' court charged with (1) larceny of 10s. and (2) larceny of a pedal-cycle. On the first charge he was sentenced to 25 days' imprisonment and on the second charge was placed on probation for two years.

He later committed a breach of the conditions of the order and was committed to quarter sessions for sentence. He was there sentenced to Borstal training for the original offence of stealing the pedal-cycle.

I and other colleagues are of the opinion that the offence for which A received 25 days' imprisonment and the Borstal conviction are two separate convictions which make him amenable to a sentence of corrective training.

The other view is that the Borstal sentence has retrospective effect and, in view of the decision in *R.* v. *Rogers* (117 J.P. 83), the two convictions are on the one occasion and not two separate occasions.

I rely on section 6 (4) (*b*) of the Criminal Justice Act, 1948, which states, *inter alia*, that the court which deals with the breach of the order shall have the power to deal with the offender as if he had *then and there been convicted by that court.* I think this supports the view that the Borstal training is a separate conviction on a subsequent occasion. I have also encountered the position where a magistrates' court sentences an offender for the breach of a probation order imposed on him when a juvenile and the conviction at the magistrates' court being proved as a conviction for the purpose of corrective training. This also lends support to the view that a sentence for the original offence is not retrospective to the date of the order.

I should be grateful for your views on this matter.

[J. K. H.]

ANSWER

The point is covered by *R.* v. *Perfect* [1957] 2 All E.R. 250. In that case it was held that, because of the terms of section 12 (1) of the Criminal Justice Act, 1948, " The conviction for which a probation order was made did not rank as a conviction till the appellant was sentenced at the sessions." Accordingly the defendant has, in the present case, been convicted on " two previous occasions " as defined in *R.* v. *Rogers* [1953] 2 All E.R. 206 (above).

It should be added, however, that what was done in the magistrates' court in this case was exactly what the Court of Criminal Appeal in *R.* v. *Evans* [1958] 3 All E.R. 673 said should not be done, namely, making a probation order at the same time as a sentence involving detention was imposed. In *R.* v. *Evans* the probation order was quashed and a concurrent sentence of detention was substituted. If the same course were taken in the present case both convictions would be " on the same occasion."

[A. E. J.]

Letters to the Editor

The Police as Prosecuting Officers

Sir,

I read with great interest and profit the recent series of articles by Christopher Williams in *The Criminal Law Review* on the subject of police prosecuting in court. I re-read the articles now they are published in book form, under the title of *Prosecuting Officer*, and again I have been both amused and instructed.

I should like to make the publication of this book the occasion for ventilating the whole question of whether police officers should be allowed to undertake prosecutions at all. Despite what Mr. Williams says, I am doubtful about the legality of Police Officers acting as prosecutors; I am more than doubtful about its wisdom.

When I left the Metropolitan Police in 1950 there were three types of prosecution in the Metropolitan Magistrates' Courts:

1. Those of sufficient importance or complication to justify the employment of one of the professional solicitors in the Solicitors' Department at New Scotland Yard.
2. The ordinary simple case where the Officer arresting or summoning can do the prosecution himself.
3. A few cases, mostly cases of dangerous or careless driving where it wasn't thought necessary to obtain the services of a solicitor, but because there might be a number of private witnesses a senior officer with the rank of Inspector or above was shown as complainant and took over the job of prosecutor.

I was told at that time in Durham that the courts here would not stand for the Metropolitan system because the courts were used to, and liked seeing, the Superintendent or Sub-Divisional Inspector prosecuting in each case. If this statement was entirely true, the reason for it simply was, I think, that in the old days with a lay Bench of magistrates and a part-time clerk, it was thought that the junior officer would not be able to deal with any question of law that might arise and neither the Bench nor the clerk would be capable of putting him right. These conditions no longer apply. Throughout the country, almost all clerks are full-time; they are certainly all fully qualified solicitors.

I prefer the Metropolitan system not only because I was educated in the Metropolitan Police; there are a number of reasons for this preference:

1. When Police Courts were changed to Magistrates' Courts in name, it was sometimes said that the change was that of name only. It would certainly appear to the stranger that the police run the magistrates' courts throughout the country, and one of the chief reasons for saying this is that a police officer prosecutes in nearly every case.
2. It is wrong that an unqualified police officer should sometimes have to argue points of law with a qualified solicitor or barrister.
3. It is wrong that a police officer fulfilling his duty as prosecutor should sometimes have to cross-examine a witness strongly.
4. It is wrong that a police officer opening a case for the prosecution should find it necessary, in doing his duty, to urge action

upon the Bench—which can only properly be done by a solicitor or barrister.

I am told that the system will never be changed because of the expense of employing solicitors in a large number of cases. There seems to me to be a simple solution to the problem. At most courts in the country there are a number of solicitors who appear regularly. The custom in Durham is to distribute the prosecution briefs amongst all the solicitors who regularly attend court. I would have thought it quite possible to ask one of these solicitors to conduct all the prosecutions on a particular day.

He would, in fact, add to his responsibilities on that day a large number of minor prosecutions, many of which are pleas of Guilty. He would be receiving fees in respect of the big cases he was already undertaking and would presumably be willing to appear in the rest of the cases on the list for a fairly modest fee.

Some police officers are concerned about this problem and I should like to see more members of the legal profession concerned.

Yours faithfully,
A. A. Muir,
Chief Constable of Durham.

Sir,

I must leave to others more learned than myself the task of resolving Mr. Muir's doubts about the legality of police officers acting as prosecutors. I would just point out, however, that, on page 10 of *Prosecuting Officer*, I ventured to put forward, through the convenient mouth of Superintendent Portly, a possible legal basis for the practice.

But whatever the legality of the practice, there is no doubt about its widespread use in this country. Nevertheless, Mr. Muir perfectly properly questions its wisdom. In this he is not alone. Lord Merthyr, giving evidence on behalf of the Magistrates' Association to the Royal Commission on the Police on January 26 last, shared Mr. Muir's misgivings about the wisdom, though he did not share his doubts about the legality. Like Mr. Muir, Lord Merthyr greatly preferred the method used in the Metropolitan Police.

But, unlike Lord Merthyr, Mr. Muir and Superintendent Portly, I hold no decided views on this problem. I merely notice that in fact Police Officers *do* conduct prosecutions. My argument simply is that, while this is so, they ought to do it better than some of them do. Naturally, if every magistrates' court in the country had its stipendiary, or even its full-time qualified clerk, then the Metropolitan Police system would work perfectly satisfactorily for all cases not positively requiring presentation by a qualified lawyer. Unfortunately, in many parts of the country this just is not the case. For instance, in my counties, not one of the eleven magistrates' courts has a full-time clerk. In every case he is just a solicitor in general practice, and they often put in a deputy who has little experience of court work.

At the same time, although I have no strong views in favour of the practice, I cannot refrain from comment on the arguments against it employed by Mr. Muir, if I may do so without seeming contentious. I find them in the fifth paragraph of his extremely interesting and persuasive letter. Let me take them one by one.

First, the sight of an Inspector on his feet, gently and responsibly conducting the case before the court is, I would have thought, no more likely to give a stranger the impression that the police are running the court, than is the defending solicitor to give the impression that it is the defence which is doing so. Policemen acting as ushers, administering the oath and so on are far more likely to give this wrong impression. Furthermore, the intervention by the clerk in a case inadequately presented by an inexperienced Constable, merely in order to bring out proper points, is far more likely to give an impression of the court being on the side of the police than anything else. While, no doubt, an experienced full-time qualified clerk, as in a Metropolitan Magistrates' Court, can perform this task without giving this impression, it is doubtful if the same could be said of an inexperienced part-time clerk.

Secondly, any competent Inspector knows (or at any rate should know) quite enough criminal law to enable him to argue points of law with the average solicitor; a comparison of qualifying examination papers should show this. In any event, if the point of law is beyond the scope of a competent Inspector, then the case probably ought to have been presented by a solicitor from the beginning.

Thirdly, of course, a police officer ought not to cross-examine too strongly. But surely there is nothing wrong in him doing so firmly.

Fourthly, I would agree that a police officer ought not to urge any course of action upon the Bench. But surely this should not prevent him giving an outline of the facts for the assistance of the Bench, and generally presenting the case in a simple but effective fashion.

My point really is that, while this practice exists, police officers are perfectly capable of following it effectively, without much harm to anyone. Dr. R. M. Jackson, J.P., of Cambridge, who was also giving evidence on behalf of the Magistrates' Association to the Royal Commission on the Police, said he had often heard police officers conducting prosecutions well and fairly, and solicitors conducting them poorly and unfairly. In other words, I hope to see the present system operated better, while Mr. Muir hopes to see it replaced. I do not really feel that it matters so very much which happens. But if in truth there are substantial objections to the present practice, upon either professional or ethical grounds, one would expect the lawyers to put them forward. It is disappointing, therefore, to find that the Law Society's Memorandum of Evidence to the Royal Commission on the Police contents itself, in this connection, with giving two reasons why police should not act as prosecutors: (a) the public cannot accept that the prosecutor is dispassionate, because the prosecuting officer is so often the superior officer of the policeman witness; and (b) police officers lack the necessary legal training. One had hoped that they would deal with the legal objections, if there are any. And, in view of what Mr. Muir so rightly says about the cost of placing all except trivial cases in the hands of solicitors to conduct, one could have wished to see some concrete suggestions for overcoming this difficulty, on the basis of what Mr. Muir calls " a fairly modest fee."

Yours faithfully,

T. C. WILLIAMS,
Chief Constable of Huntingdonshire
and the Isle of Ely.

"Assessors in Criminal Trials in West Africa"

Sir,

I must say that I enjoyed reading the article on "Assessors in Criminal Trials in West Africa" published in November and December, 1960, editions of *The Criminal Law Review*. I should, however, be grateful if you would kindly permit me to observe briefly.

1. Although the stated intention of your contributor was to describe the method by which assessors arrive at their opinions and their status at different stages in the criminal trial, it seems desirable, at least, to point out the dual character of the concept. The term assessors, as understood in West African jurisprudence, has two distinct meanings, namely,

(i) as witnesses to fact
(ii) as quasi-judges

(*vide* Elias, *Ground Work of Nigerian Law*, footnote at p. 44).

2. In their first role, the assessors' duty is to advise the court on issues involving special knowledge and, generally, their views are given in the abstract concerning the native law and custom governing a case. In this capacity, they are witnesses, as it were, of African customary ways of life. Hence, to complete the passage culled from the judgment of Ayyangar J. in *King Emperor* v. *Tivumal Reddi* (1901) ". . . assessors are analogous to expert witnesses and in principle the opinion of an assessor is substantially on the same footing as the opinion evidence of expert witnesses . . . the opinion of an assessor given upon the whole case tried before a Court of Session or any portion of such a case is, in principle, on the same footing as the opinion evidence of a person specially skilled in foreign law, science or art." But, in deciding the case before him, the judge is not bound to admit these advisory opinions for, unlike expert evidence, they are neither subject to cross-examination nor, indeed, to any other process by which the validity of a legal proposition could be judicially tested. Judicial opinion has, nevertheless, continued to waver between treating the assessors' opinion in this respect as expert evidence in the ordinary sense or as only a special type of evidence (*vide Pande* v. *R.* (1951) East African Court of Appeal 263). It remains to note that this advisory role is chiefly concerned with civil proceedings.

3. The other function of assessors features primarily in criminal trials: it is their duty to assess the evidence. In the light of special knowledge which they are supposed to possess of the custom, language, general habits and peculiarities, or otherwise, of the indigenous people of the locality in question, it is assumed that they are better placed "to judge the probability of a story told by a witness, and may detect in his demeanour what may escape the presiding judge." In such cases, they weigh the evidence and determine whether the accused is guilty or not (*vide* generally Allott, *Essays in African Law*, pp. 79–80, where the picture is presented in clear setting and to which I am largely indebted for this note).

4. But the early Nigerian Ordinances, however, made no serious distinction between the different functions of assessors in civil and criminal cases. Ordinance No. 13 of 1863, for example, provided, *inter alia*, for the appointment of two assessors to assist the Chief Magistrate in his judicial duties. And Ordinance No. 1 of 1864 actually provided that the Chief Justice, as the President of the Supreme Court

of Her Majesty's Settlement of Lagos, should be assisted by two assessors and that, in all cases, *civil and criminal*, the Chief Justice and the two assessors should be "sole judges of and determine all questions as well of fact as of law." Ordinance No. 9 of 1864 provided that the Chief Magistrate and the assessors should by a majority be sole judges of *fact* in all criminal and civil cases except in capital offences where provision was made for a jury of seven to adjudicate on the facts and the judge alone to determine the law (*vide* Elias, *Ground Work of Nigerian Law*, pp. 43–44).

5. The proposition by your contributor that "unlike a jury trial in England, there is no right of challenge," needs some qualification, at least, in so far as it purported to embrace Nigeria where such a right has, in fact, been in existence for almost a century. For instance, Ordinance No. 13 of 1863 provided that, if the magistrate sitting with two assessors, should himself be an interested person, then the case should be determined by the two assessors sitting with him. If, instead, one of the assessors was interested, then the magistrate and the other assessor alone should determine the case; if all the assessors were interested, then the magistrate alone should decide. If the three were all interested, the Governor should appoint two *other independent assessors to act as judges* (*vide* Elias, *Ground Work of Nigerian Law*, pp. 43–44). The present position is that ". . . the person charged may object to any assessors so appointed, and the court shall refuse to allow such assessor to sit if the grounds for such objection are substantial and reasonable" (*vide* s. 446 of the Criminal Procedure Ordinance, Vol. II of the 1958 Revised Edition of the *Laws of Nigeria*, chap. 43).

6. Similarly, the statement that "where statutory provisions have been made in West Africa for discharge of jurors they have by the same provisions been made applicable to assessors" does not, with respect, seem to reflect the correct position in Nigeria where, incidentally, the relevant Ordinances are remarkably silent on the point (*vide* 1958 Revised Edition of the *Laws of Nigeria*—

(a) Vol. II, chap. 43, Criminal Procedure Ordinance: ss. 441–452

(b) Vol. III, chap. 90, Jury Ordinance: ss. 67–68; 72–74).

7. Perhaps your journal is hardly the proper forum to criticise the system; nevertheless, one is prone to doubt the relevance of assessors at all in the present machinery of justice in Nigeria or in West Africa for that matter. First, they are rarely called into aid and, on the few occasions when that happens, their functions, both advisory and judicial, are rather minimal. Secondly, nearly all the West African Codes now provide for the jury system, probably, as in Nigeria, along English lines. Thirdly, some of the provisions apply to assessors and juries alike: thus in Nigeria, he may, like the juror, "put any questions to the witnesses, through or by leave of the judge, which the judge himself might put and which he considers proper" (*vide* 1958 Revised Edition of the *Laws of Nigeria*, Vol. II, chap. 62, Evidence Ordinance, s. 223); and the same "qualification-criteria" apply to both although, unlike the juror, it is no disability if the assessor is unable "to speak the English language and understand the same when spoken" (*vide* 1958 Revised Edition of the *Laws of Nigeria*, Vol. II, chap. 43, Criminal Procedure Ordinance, s. 441). Just what aid would an illiterate, if intelligent, assessor give to the judge where proceedings, as in Nigeria, are conducted in English, the use of interpreters

notwithstanding! And where, although " the opinion of each assessor shall be given orally and shall be recorded in writing by the court . . . but the decision . . . shall be vested exclusively in the judge." Fourthly, one may not now be reasonably persuaded, as the Privy Council was in *R.* v. *Dhalamini* (1943), of the need for the presence of assessors " as a safeguard to the natives accused of crime, and a guarantee to the native population that their own customs and habits of life are not misunderstood " in the face of the present tendency in West Africa to replace the non-indigenous with indigenous judicial personnel (*e.g.*, only one out of the four Chief Justices in Nigeria, is an expatriate; those of Ghana and Sierra-Leone are all natives). Fifthly, in this country, at any rate, s. 58 of the Evidence Ordinance provides that " in deciding questions of native law and custom the opinions of native chiefs or other persons having special knowledge of native law and custom . . . are relevant " (*vide* Vol. II, chap. 62 of the 1958 Revised Edition of the *Laws of Nigeria*). Sixthly, it might not be insignificant to mention that the concept itself has entirely lost favour with its parent country—India (*vide* Allott, *Essays in African Law*, No. 1, p. 81). Finally, the provisions relating to assessors are rather haphazard and generally lacking in precision with little, or no, clear-cut objective underlying them. It seems to me an entirely obsolete conception and, if anything, largely superfluous in the present system.

Yours faithfully,

NWEKE R. UGO.

Federal Ministry of Education,
Lagos, Nigeria.

Books and Periodicals

Book reviews:

Prosecuting Officer. By Christopher Williams. Sweet & Maxwell, Ltd. 1960. 194 pp. (including index). 15s. net.

In this book the author has used a fresh medium of imparting information on a subject which, as he says in his preface, can be as "dry as dust." The chapters of the book contain a series of tutorial periods at which a benign Superintendent carefully and thoroughly deals with practical problems posed by a slightly subservient Inspector whose knowledge does not match his rank.

Being a barrister and a police officer Christopher Williams has a great advantage over others by having a foot in both camps, and from that position gently reminds those who question the right for police to act as prosecutor that the Magistrates' Courts Act, 1952, permits of this to whoever lays the information, be he police officer or civilian. A good piece of advice is also given to the verbose and "may it please you your worship" police prosecutor to leave advocacy in courts to those who have been trained and are experienced in this art.

The most interesting and instructive chapter is the one headed "Past Imperfect." Here the author has caused his characters to discuss in detail many of the difficulties which have or will beset those who regularly attend magistrates' courts.

This book is good value for money, and whilst it does not vie with tomes such as *Phipson* its contents will be of inestimable assistance to all, irrespective of which branch of the law the individual belongs to.

T. J. H.

Number Ten, Rillington Place. By Ludovic Kennedy. London: Gollancz. 1960. 297 pp. 21s. net.

The eight-year-old controversy — which man, Evans or Christie, strangled Beryl and Geraldine Evans in November 1949—is revived in a book in which the author declares himself a fervent believer in Evans' innocence, and he opens with a plea to the Home Secretary to set up a new Inquiry "to clear up the matter for once and all." Mr. Kennedy suggests there is considerable and reasonable doubt about Evans' guilt. Mr. Kennedy claims the dramatic discovery of a new point, the statement in Evans' solicitor's brief to counsel that, according to Dr. Teare's evidence at the magistrates' court, "there might have been an attempt at sexual penetration (of Mrs. Evans' body) *after death*," which, if true, confirms Christie as her murderer beyond any shadow of doubt. With that everyone, including the Home Secretary, would be forced to agree, for Christie, we know, was a necrophilic killer. What is the strength of Mr. Kennedy's startling discovery? He admits that there is no reference to "after death" in the deposition of Dr. Teare's evidence but he suggests that the solicitor and his clerk could hardly have invented it. Dr. Teare stated only that the bruise on

Mrs. Evans' vagina "could have been caused by an attempt at forced intercourse or in a struggle," and he told Mr. Kennedy that he could find nothing in his notes to have led him to such a conclusion. Dr. Teare has informed your reviewer that his notes clearly say "an ante-mortem bruise in Beryl's vagina, and I can only imagine that Freeborough mistook 'ante-mortem' for 'post-mortem,' because I would not have used the word 'bruise' after the word 'post-mortem.' It would have been a contradiction in terms." Thus, on examination, Mr. Kennedy's "dramatic discovery" dissolves into dust. He might have avoided this pitfall if he had read Dr. Teare's post-mortem report which is printed verbatim in Camps, *Medical and Scientific Investigations into the Christie Case* (which he consulted), which states "There was an old scar in the vagina and besides this scar a little *ante-mortem* bruising."

Kennedy makes another statement which is open to question; his choice of "5.30" as the time Evans returned home on the fatal day, for which there is no evidence. But it is a convenient way to overcome one of the major objections to Christie's guilt, the fact that he left the house empty for nearly an hour. If he had murdered Mrs. Evans at lunch time, he could not have risked leaving the house with a strangled body upstairs when Evans might come home early, find the body and call the police.

Despite these criticisms, Mr. Kennedy's book is deserving of serious consideration by all those who are interested in the mystery of the two similar stranglers who lived in the same small slum house.

RUPERT FURNEAUX.

Road Traffic Offences. By G. S. Wilkinson. The Solicitors' Law Stationery Society, Ltd. 1960. 319 pp. (including index) and tables (59 pp.). £2 net.

This book is the third edition of what is now a well-known work to those concerned with this subject and it is particularly welcome at this time in view of the 1960 road traffic legislation. In the preface to the first edition (1953) the author indicated that his purpose in writing the book was to give a general statement of the law relating to road traffic together with such detailed discussions as were possible within the limits of a reasonable size. However, the legislation and case law upon this subject have been such that, whilst the author faithfully adheres to his original objective, it has been necessary to increase the number of pages (excluding tables) from 195 in the original edition to 319 in the present edition.

At the beginning of the book there is to be found a useful table of comparison showing where the provisions of the principal Road Traffic Acts repealed by the 1960 Act are reproduced in that Act. In order to facilitate reference further, it will be found that in the text itself mention of a section in the 1960 Act is usually followed by an indication of the old replaced section. The first three chapters of the book deal comprehensively with a number of preliminary matters, *viz.*, Definitions, Procedure and Evidence and Notices of Intended Prosecution. The remaining chapters then deal with Specific Offences, Penalties, Endorsement and Disqualification, Special Reasons and

Appeals. In the appendices there will be found the texts of some selected regulations and orders and extracts from British Medical Association pamphlets on intoxication. There is an adequate index at the end of the book and on the front page will be found a table of braking distances and a table for converting miles per hour into feet per second.

The text of this book chiefly takes the form of "notes" and particularly useful are the many references to Scottish, Irish and Dominion cases and also decisions of magistrates' courts. The layout of the work is clear and the author has managed to include references to the very latest cases, Acts and Instruments. The reader will not find in this book any lengthy academic treatise touching some of the nicer technical points which can easily be made to assert themselves when dealing with this subject. However, most technical matters which are likely to arise in practice are dealt with in a characteristically pithy manner. Short reference is perhaps made to a relevant case, sufficient to acquaint the reader with the gist of the decision, and this might be followed by a reference to an article or discussion on the point in some legal periodical. In short, there will always be found in this book the foundations for argument on points of this kind, and it will then be for the reader to build his own stronghold by making further inquiry and examining the sources referred to. In this respect it is worth mentioning that members of the Law Society can, for a fee, obtain copies of most of the cases mentioned in the book from the Law Society's Hall. In a book which is bristling with so much technical data it is pleasing to fall occasionally upon a plum, *e.g.*, referring to *Haines* v. *Roberts* [1953] 1 All E.R. 344. the author says: "When accused by the police of an offence under s. 6 (2) he (the defendant) succinctly paraphrased his counsel's arguments by replying: 'I was not in charge of any bloody bike.'"

Your reviewer is confident that the third edition of this book will continue to provide that reliable guide which so many readers have found in its predecessors.

KEITH C. CLARKE.

Readers' digest:

Homicide: Smith's case: another view: 105 *Solicitors' Journal* 30.

Insanity: The criminal law and mentally abnormal offenders: *Brit. Journal of Criminology*, Vol. 1, No. 3, p. 203.

Juveniles: The Criminal Justice Bill—a probation view: 125 *Justice of the Peace* 44.

Juveniles: Parental refusal of blood transfusion: 105 *Solicitors' Journal* 97.

Juveniles: The Report of the Committee on Children and Young Persons: (continued) 125 *Justice of the Peace* 4; (concluded) 125 *Justice of the Peace* 30.

Larceny: Rape of the lock: 125 *Justice of the Peace* 12.

Magistrates Courts: Clerk retiring with the justices: 105 *Solicitors' Journal* 48.

Magistrates Courts: Information or complaint (based on *R.* v. *Nottingham JJ., ex p. Brown* and *Smith* v. *Baker*): 111 *Law Journal* 70.

Offensive weapons: Offensive weapons: 69 *Police Review* 82 and 104.

Procedure; Habeas Corpus: Half a loaf: a note on the Administration of Justice Act: 231 *Law Times* 17.

Prostitution: Prostitution: a survey of the present position: 125 *Justice of the Peace* 59.

Road Traffic: Driving away (based on *D.* (*An Infant*) v. *Parsons* [1960] 1 W.L.R. 797): 105 *Solicitors' Journal* 25.

Sentence: Alternatives to the short sentence: 125 *Justice of the Peace* 17.

Sentence: Probation: 231 *Law Times* 62.

Trial: Autrefois convict: 105 *Solicitors' Journal* 52.

Sweet & Maxwell Limited and Contributors

1961

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 11 *New Fetter Lane, E.C.4. Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE CRIMINAL LAW REVIEW

April 1961

Report of the Streatfeild Committee [1]

This report is as admirable as it is important. One can only hope that the general enthusiasm with which it has been greeted will be matched by a speedy implementation of its proposals. The Committee have dealt thoroughly with the problems of the dispatch of criminal business in the superior courts and the provision to the courts of information relevant to sentencing. They have not been afraid to adopt a fresh approach to these matters and to make a number of far-reaching proposals.

Perhaps the most striking part of the report is that concerned with sentencing. The Committee began with a crucial recognition that the so-called " tariff system "—relating the sentence to the degree of the offender's culpability—is a thing of the past. The aims of sentencers are now acknowledged to be manifold and often conflicting. In order to make a rational selection from among the available forms of treatment, a sentencing court needs information about the effectiveness of different sentences in achieving their various aims. To this end the Committee make bold suggestions for the communication to the courts of the results of criminological research; for the publication and provision to sentencers of a booklet on the aims and effects of different types of sentence; for visits by judges to penal institutions—in a word, for the education, and the regularly revised education, of sentencers.

At the same time the court should be supplied (before the trial whenever possible, and not by adjournment after conviction) with such information about the particular offender as is relevant to the choice of suitable treatment. One of the main recommendations for this purpose is that probation officers should make pre-trial inquiries about all accused persons under thirty who do not object, and should prepare reports which do not hesitate to give opinions as to the likely effects of different forms of sentences. An appreciation of the policy behind this proposal does not prevent some concern at the strain likely to be imposed on the probation service.

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[1] *Report of the Interdepartmental Committee on the Business of the Criminal Courts.* Cmnd. 1289.

In the first part of their report the Committee, having discovered that too many accused persons are waiting far too long for their trials and that " the machinery of the superior courts . . . is creaking under the strain which is being put upon it," tackle the unenviable task of suggesting remedies. Our system of criminal justice may need a more root-and-branch reform than this Committee's terms of reference entitled them to consider. As it was, the discovery of methods for the relief of congestion was to a large extent a matter of juggling ingeniously with the traditional operations of the existing courts and the distribution of work among them. This was the more true once the Committee had decided against the establishment of more Crown Courts on a number of grounds, in particular the danger of staleness as an occupational disease of full-time judges.

The general aim of the reforms proposed is to ensure as short a waiting period as possible before trial, with a normal maximum of eight weeks. One of the most drastic steps suggested is to extend summary jurisdiction to cover a large amount of work now done by the superior courts, especially the trial of breaking offences not involving dwelling-houses. Apart from this controversial suggestion, the Committee have shown themselves prepared to dispense with traditional features of the existing system. For instance, they would give quarter sessions the power to sit as often as possible and would rename them simply " sessions," and they recommend that the judges' itineraries should be reorganised to some extent in disregard of circuit boundaries. In general it may be said that the detailed proposals in this part of the report are a conscientious attempt to bring order out of chaos by the manipulation of some very intractable material. The success of the attempt will depend upon a great deal of co-operation between the courts involved, and upon the Committee's having made tolerably accurate estimates of the effect of their various and complex recommendations.

Sleep as a defence

In a recent murder trial the accused gave evidence that he had gone to sleep lying beside the deceased, and that later he had awoken to find that he was lying over her with his hands round her throat and that she was dead. He was acquitted. The case has aroused a certain amount of comment, and has been the subject of questions in Parliament.[2] The Secretary and Under-Secretary of State have thought the case to be without precedent. There may be no other case in this country of a murder trial following an attack committed during sleep. But the recent case is not essentially different from other cases in which acts are done during sleep which would constitute criminal offences if the actor were awake; and of these there have been several examples.[3]

It was clear that there could be no conviction if the jury accepted the defence story or were in doubt whether the accused was awake or asleep at the time of the killing. And unless, in such a case, the acquittal can be qualified by a finding of insanity, the accused must go free, with the consequent possibility of a repetition of the conduct which brought him before the court. The fact that the recent case involved a death has given it perhaps undue prominence. It is a most unusual case,[4] and there seems no need for panic measures to deal with possible recurrences of the problem it poses. If a defence of sleep should become fashionable, one can foresee attempts by the prosecution, in appropriate cases, to apply a procedure recently shown to be available in some cases of automatism—that is to say, proof by the prosecution that the unconscious conduct was the result of a " disease of the mind," so as to secure a verdict of " guilty but insane " and the detention of the accused.[5] But there are both medical and legal difficulties in this suggestion which can hardly be investigated in this brief note.

A post-graduate course in criminology

The Cambridge University Institute of Criminology is to give a post-graduate course leading to a Diploma in Criminology. The first course will be held during the academic year commencing October 1961. Application forms (returnable by May 15) are available from the Secretary, Institute of Criminology, 4 Scroope Terrace, Cambridge.

The course will be both theoretical and practical. The 105 lectures and 90 seminars will cover all the major aspects of criminology, including methodology of research, the psychological and psychiatric context of criminal conduct, the sentencing process and the treatment of offenders. Practical work, in vacations, as well as term-time, will be undertaken at penal, psychiatric and other institutions. Instructors will include the Wolfson Professor, the senior staff of the Institute, visiting lecturers, and experts from the Home Office and the Home Office Research Unit.

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[2] H.L. Debates, Vol. 229, col. 13; H.C. Debates, Vol. 635, col. 73.

[3] See some cases related in Glanville Williams, *The Criminal Law*, p. 11, n. 4.

[4] But see in Scotland, *H.M. Advocate* v. *Fraser* (1878) 4 Couper 70.

[5] See *R.* v. *Kemp* [1957] 1 Q.B. 399.

Graduates in any subject will be eligible for admission to the course; and in very exceptional circumstances non-graduates may be considered, if they have made an important contribution to criminology by research or gained outstanding practical experience in administration. Only a limited number of candidates will be admitted to the course; they will become members of the University and will be expected to seek admission to a college.

The recommendations of the Streatfeild Committee (reviewed above, p. 209) make it even more urgent than hitherto that there should be a large number of people trained to a high level in the lore and language of criminology. The new Cambridge course should make an important contribution to the development of a truly modern approach to sentencing, and its foundation is timely.

Judicial appointments

Mr. Donald Charles Bain, M.C., has been appointed Recorder of Rochester.

Mr. Ralph Vincent Cusack, Q.C., has been appointed Recorder of Gloucester.

The Rt. Hon. Lord Dunboyne has been appointed Recorder of Hastings.

Mr. Rudolph Lyons, Q.C., has been appointed Recorder of Sheffield. Mr. Lyons has relinquished his Recordership of Newcastle-upon-Tyne.

Mr. Neil Martin McElligott has been appointed Recorder of King's Lynn.

Mr. Patrick McCarthy O'Connor, Q.C., has been appointed Recorder of Southend. Mr. O'Connor has relinquished his Recordership of King's Lynn.

Mr. Henry Cooper Scott has been appointed Recorder of York.

Mr. Henry Gaunt Suddards has been appointed Recorder of Middlesbrough. Mr. Suddards has relinquished his Recordership of Pontefract.

Mr. George Stanley Waller, O.B.E., Q.C., has been appointed Recorder of Leeds. Mr. Waller has relinquished his Recordership of Sheffield.

Mr. William Thomas Wells, Q.C., has been appointed Deputy Chairman of Hertford Quarter Sessions.

Mr. Howard William Maitland Coley has been appointed a Stipendiary Magistrate within the limits of the South Staffordshire Stipendiary Justice Act, 1899.

Imputations on the Character of the Prosecutor or the Witnesses for the Prosecution—A Restatement—II.

By Edward Griew, m.a., ll.b.

(*Continuation of an article printed at* [1961] Crim.L.R. 142)

IV. The Judge's Discretion

§ 15. General rule

If the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, cross-examination of the accused as to his character, if he gives evidence, is not automatically to be allowed. The trial judge must exercise his discretion to allow or disallow such cross-examination.[83] With the exception of the rape cases,[84] no firm rules have been laid down determining how the discretion should be exercised in particular cases. Relevant factors will be discussed in the next section. The main concern of the judge will be to ensure a trial that is fair to both sides.[85]

§ 16. Matters affecting the exercise of the discretion (1)

The matters which, on principle or on the basis of decided cases, may affect the mind of the judge when exercising his discretion under the statute, are conveniently divided into two classes: (1) considerations stemming from the nature of the attack made on the character of the prosecutor or prosecution witnesses; and (2) other considerations. This section will deal with the former class.

(a) *Imputations deriving from attempt to establish a defence*

It is now settled that an imputation on the character of a prosecution witness will not be any the less an imputation within the meaning of the statute because it is made in the course of developing a defence.[86] Yet the cases decided before this rule was finally established show that the courts were reluctant to apply the section strictly where to do so might deter the raising of a defence.[87] A similar reluctance might now be reflected in a refusal in such a case to permit cross-examination of the accused as to his past record. In *R.* v. *Cook*[88] Devlin J. referred to " the protection which [the judge] would desire to extend as far as possible to an accused who was endeavouring only to develop a line of defence." A similar approach is suggested by Lord Goddard C.J.'s explanation,[89] already referred to,[90] of *R.* v. *Biggin*.[91] Moreover, in *R.* v. *Brown*[92] cross-examination of the accused under the section was held to have been properly allowed expressly because the defence in its attack on the prosecution witness had gone further than merely developing a defence of self-defence.

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[83] See § 10 (b), above. For criticism of the discretionary nature of the application of the statute, see Nokes (1959) 22 M.L.R. at 513–514.

[84] See § 14, above.

[85] See *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1, at 15, C.C.A.; *R.* v. *Cook* [1959] 2 Q.B. 340, at 345, C.C.A.; [1959] Crim.L.R. 358.

[86] See § 10, above.

(b) *Deliberate attack or incidental imputation?*

It may be suggested that the judge is entitled to bear in mind, as a factor influencing the exercise of his discretion, whether the imputation is the result of a deliberate attack on a prosecution witness calculated to discredit his testimony, or arises out of a genuine attempt to elicit facts in connection with the offence charged or the matters with which the evidence of the witness has dealt. Material tending to justify this distinction is provided by:

(i) some of the early decisions in which the courts demonstrated a reluctance to visit cross-examination as to his past record upon an accused whose attempts to elicit facts relevant to the matter charged had involved imputations on prosecution witnesses[93]; and

(ii) dicta in leading judgments suggesting that cross-examination under the section is most commonly justified where the defence has attempted by an attack on the character of a prosecution witness to impugn that witness's credit, the main purpose of the statutory cross-examination being to restore the balance by revealing circumstances affecting the credit of the accused himself.[94]

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[87] See § 9, above.

[88] [1959] 2 Q.B. 340, at 347.

[89] *R.* v. *Clark* [1955] 2 Q.B. 469, at 475; [1955] Crim.L.R. 567.

[90] Above, p. 154.

[91] [1920] 1 K.B. 213.

[92] (1960) 44 Cr.App.R. 181; [1960] Crim.L.R. 556; see § 11 (5), above.

[93] See § 9, above, *passim*.

[94] See quotations from *R.* v. *Preston* [1909] 1 K.B. 568, at 575, and *R.* v. *Westfall* (1912) 7 Cr.App.R. 176, at 179, at page 147, note 26, above; *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1, at 15, *per* Jenkins J. (" [In] the ordinary and normal case [the judge] may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgment

It must, however, be observed that the Court of Criminal Appeal has not tended to disapprove of the exercise of the judge's discretion in favour of permitting the statutory cross-examination where imputations have been made upon the character of a prosecution witness in the course of dealing with the facts in issue or relevant to the issue. The course of the decisions on appeal is not conclusive, however. For the decision of the trial judge will not be disturbed by the Court of Criminal Appeal unless he has erred in principle or failed to exercise his discretion.[95]

(c) *Emphatic denial of the charge*

The assertion that a prosecution witness is lying would probably now be held to be technically an imputation within the meaning of section 1 (*f*) (ii). Assertions of this kind, however, have always been treated merely as forms of emphatic denial of the prosecution case and not as justifying cross-examination of the accused under the section.[96] As recently as 1955, Lord Goddard C.J. said[97]:

> ". . . I do not believe that any judge would allow a roving cross-examination into the prisoner's past merely because he said, 'The police constable is a liar,' or 'The police constable is not telling the truth'; for all he is doing is pleading not guilty with emphasis. . . ."

It may therefore be assumed that a judge would only in exceptional circumstances allow the prosecution to cross-examine the accused on his past record in answer to an allegation that prosecution witnesses are lying or that evidence is false.[98]

(d) *Defence allegation not carried far or seriously pressed*

In exercising his discretion, the judge might bear in mind, in an appropriate case, the fact that an attack on a prosecution witness which technically involves an imputation on his character has not been pressed very far or formed a serious or substantial item in the defence case. This suggestion, though not strongly

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whether the accused person is any more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark about an accused person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section"); *R.* v. *Cook* [1959] 2 Q.B. 340, at 348, *per* Devlin J. ("Is a deliberate attack being made upon the conduct of the police officer calculated to discredit him wholly as a witness?").

[95] See § 25, below.

[96] See § 12 (1), above, and notes 58 to 61 thereto.

[97] *R.* v. *Clark* [1955] 2 Q.B. 469, at 478.

[98] For a case where the defence allegation of untruthfulness went beyond the witness's evidence, see *R.* v. *Rappolt* (1911) 6 Cr.App.R. 156 (§ 11 (7), above).

supported by the authorities, is consistent with the treatment of alleged imputations in *R.* v. *Preston*[99] (where the relevant matter was not pleaded by counsel as part of the defence) and *R.* v. *Westfall*[1] (where the prosecutor was alleged to be an habitual drunkard, but not enough was said, in the view of the court, to constitute an "imputation" within the section and to expose the accused to the consequences of cross-examination as to previous convictions; and where a statement, made by the accused before the magistrate and put in evidence by the prosecution at the trial, was not sufficiently "the basis of the defence" for the purposes of the section).

§ 17. **Matters affecting the exercise of the discretion (2)**

The following are some other considerations which may affect the mind of the judge in exercising his discretion:

(a) *Prejudicial effect of cross-examination*

The judge should weigh the prejudicial effect of cross-examination of the accused as to his past record against the damage done by the attack on the prosecution witnesses.[2] If the effects of such cross-examination might greatly outweigh the results of the defence's attack, so as to render a fair trial almost impossible, the cross-examination would be properly disallowed.[3]

(b) *Risk of the jury being misled as to the purpose of the cross-examination*

In *Maxwell* v. *D. P. P.*[4] (a case in which the accused had given evidence of his own good character within the meaning of the first limb of section 1 (*f*) (ii)), Viscount Sankey L.C. said (*obiter*) that the accused should not be cross-examined under the section "if there is any risk of the jury being misled into thinking that it goes not to credibility but to the probability of his having committed the offence of which he is charged." It is thought that this dictum is relevant less to the judge's discretion to allow or disallow the cross-examination than to the direction which he should give the jury as to the purpose for which evidence of the accused's past has been received.[5] For in most cases where the jury hear of convictions of similar offences there must be a danger that, unless carefully directed not to do so, they will take the evidence of those convictions into account in determining the probability of the accused's having committed the offence now charged. In a case where the danger of this approach is particularly great, Viscount Sankey's dictum may be relevant as suggesting an application of the principle noticed in paragraph (a), above.

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[99] [1909] 1 K.B. 568, C.C.A. One explanation of the treatment of the alleged imputation in this case was that it was "a mere unconsidered remark made . . . without giving any serious attention to it": see at 576; and see *R.* v. *Hudson* [1912] 2 K.B. 464, at 470.

[1] (1912) 7 Cr.App.R. 176, at 179, C.C.A.

[2] *R.* v. *Cook* [1959] 2 Q.B. 340, at 345, C.C.A.

[3] *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1, at 15, C.C.A.

[4] [1935] A.C. 309, at 321, H.L.

(c) *Accused not represented*

The fact that the accused is conducting his defence in person is clearly a fact that the judge will take into account in exercising his discretion.[6]

(d) *Imputation elicited from accused under cross-examination*

An allegation against a prosecution witness amounting to an imputation on his character may be made by the accused as a result of questions put to him in cross-examination which are calculated (deliberately or unintentionally) to trap or provoke him into making such an allegation. In such an event, the judge should refuse an application for leave to cross-examine under the section as a result of the imputation.[7]

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[5] As to the purpose for which evidence of previous convictions is admitted under the section, there is little authority. Apart from Viscount Sankey's dictum quoted in the text, there is Darling J.'s direction to the jury in *R.* v. *Morrison* (*Notable British Trials*, 204, cited by Gooderson, 11 C.L.J. at 388), according to which the evidence is admitted only on the question of the accused's credit (and see in the C.C.A., 6 Cr.App.R. at 169); and dicta to the effect that the justification for cross-examination under the section is that it will reveal the credibility of the person, that is the accused, who has attacked the credibility of prosecution witnesses (see *R.* v. *Preston* [1909] 1 K.B. at 575; *R.* v. *Westfall* (1912) 7 Cr.App.R. at 179; *R.* v. *Jenkins* (1945) 31 Cr.App.R. at 15). But no case on the second limb of s. 1 (*f*) (ii) has been the subject of successful appeal on the ground that the jury has been allowed to consider, or may have considered, the evidence of previous convictions as relevant to the issue. Nor, so far as is known, has it yet been argued before the Court of Criminal Appeal that the previous convictions or bad character on which the accused may be cross-examined, as a result of a defence involving imputations, must be limited to convictions and aspects of character relevant to credit. See, on these problems, Stone, 51 L.Q.R. 443, especially at 450–461, and 58 L.Q.R. 369, at 384–385: Gooderson, 11 C.L.J. 377, especially at 387–392.

[6] Note the parenthesis in this passage from *R.* v. *Hudson* [1912] 2 K.B. 464, at 470, *per* Lord Alverstone C.J.: "where a prisoner, *certainly when defended by counsel*, has through that counsel accused the witnesses of having committed the crime with which he, the prisoner, is charged, the case comes directly within the section and the prisoner can be cross-examined as to his character or previous convictions." (Italics supplied.) See also *R.* v. *Cook* [1959] 2 Q.B. 340, at 349, *per* Devlin J., stressing that a warning to the defence by prosecuting counsel that he will apply for leave to cross-examine under the section or a caution from the judge is "especially needful" when the accused is not represented. In *R.* v. *Benson* (1909) 3 Cr.App.R. 70, C.C.A., no special lenience seems to have been accorded to the accused in person; but it is believed that in the circumstances of that case the judge's discretion might now be differently exercised.

Similarly, a threat made to the accused that his character may be disclosed if he does not withdraw an imputation that he has made on the character of a prosecution witness, as a result of which he withdraws the imputation, prevents his defence being properly put to the jury.[8] Presumably cross-examination under the section should ordinarily be disallowed after such a threat, even if the imputation is not withdrawn.[9]

(e) *No warning given to the defence*

In *R.* v. *Cook* [10] the accused, who was not represented, suggested in cross-examination of a police officer and in his own evidence that certain statements made by him and put in evidence by the prosecution had been obtained from him by the officer by means of improper threats. No warning was given to the accused, either by counsel or by the judge, that he was going too far. The judge permitted prosecuting counsel to cross-examine the accused on his previous convictions, apparently considering that in the circumstances counsel was entitled as of right to do so. The Court of Criminal Appeal held that the judge had failed to exercise his discretion and that, no warning having been given to the accused, cross-examination should properly have been disallowed.[11]

V. MATTERS OF PRACTICE

§ 18. **Duties of prosecuting counsel**

(a) *To reveal convictions of prosecution witnesses.* When the accused has previous convictions, prosecuting counsel should himself reveal to the jury the convictions, if known to him, of a prosecution witness of any importance, so as to make it unnecessary for the defence to attack the witness and thus expose the accused to cross-examination on his own past.[12]

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[7] *R.* v. *Grout* (1909) 3 Cr.App.R. 64, C.C.A.; *R.* v. *Jones* (1909) 3 Cr.App.R. 67, at 69, C.C.A.; *R.* v. *Baldwin* (1925) 18 Cr.App.R. 175, C.C.A. See also *R.* v. *Rouse* [1904] 1 K.B. 184, at 187, *per* Phillimore J., C.C.C.R.; *R.* v. *Seigley* (1911) 6 Cr.App.R. 106, at 107, *per* Hamilton J., C.C.A.

[8] *R.* v. *Eidinow* (1932) 23 Cr.App.R. 145, C.C.A.

[9] There is no authority for this inference.

[10] [1959] 2 Q.B. 340; [1959] Crim.L.R. 358.

[11] But the court dismissed the appeal, applying the proviso to s. 4 (1) of the Criminal Appeal Act, 1907.

[12] See Humphreys (then Senior Prosecuting Counsel at the Central Criminal Court), " The Duties and Responsibilities of Prosecuting Counsel " [1955] Crim.L.R. 739, at 742.

(b) *To warn the defence.* " In cases of this sort where there is no hard and fast rule,[13] some warning to the defence that it is going too far is of great importance; and it has always been the practice for prosecuting counsel to indicate in advance that he is going to claim his rights under the subsection, or for the judge to give the defence a caution. This is especially needful when the prisoner [is not represented]. . . ." [14]

(c) *Not to provoke the accused to attack prosecution witnesses.* Prosecuting counsel should not cross-examine the accused in such a way as to lead the accused into making imputations against the character of prosecution witnesses of a kind that might justify cross-examination under the section.[15] It has already been observed that if cross-examination of the accused offends this rule, the judge may protect the accused in the exercise of his discretion.[16]

(d) *To apply for leave* to cross-examine the accused as to previous convictions or bad character on the ground that the nature or conduct of the defence has involved imputations on the character of the prosecutor or the witnesses for the prosecution.[17]

The above points affecting the conduct of prosecuting counsel may be described as matters of professional duty. The Court of Criminal Appeal has also observed that prosecuting counsel would be well advised not to embark upon cross-examination under the section unless the circumstances of the case render it, to his mind, a positive duty to do so.[18]

§ 19. Duties of the trial judge

(a) *To stop cross-examination* of the accused calculated to trap him into making imputations,[19] or improper cross-examination of the accused as to his previous convictions or bad character, without waiting for an objection by defending counsel.[20]

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[13] That is, where there is no settled rule determining how the judge's discretion should be exercised.

[14] *R.* v. *Cook* [1959] 2 Q.B. 340, at 349, *per* Devlin J., C.C.A.; repeated in *R.* v. *Morris* (1959) 43 Cr.App.R. 206, C.C.A.; [1959] Crim.L.R. 778.

[15] See cases referred to at notes 7 and 8, above. Compare *R.* v. *Beecham* [1921] 3 K.B. 464, as to questions in cross-examination forcing the accused to give evidence of his good character.

[16] See § 17 (d), above.

[17] *R.* v. *McLean* (1926) 19 Cr.App.R. 104, at 108, C.C.A.; *R.* v. *Turner* [1944] K.B. 463, at 470, C.C.A.; *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1, at 15, C.C.A. The desirability of such an application is, indeed, implicit in the existence of the judge's discretion to disallow the cross-examination.

[18] *R.* v. *Dunkley* [1927] 1 K.B. 323, at 330, *per* Lord Hewart C.J.

[19] *R.* v. *Grout* (1909) 3 Cr.App.R. 64, at 66, C.C.A.; *R.* v. *Jones* (1909) 3 Cr.App.R. 67, at 69, C.C.A.; and see *R.* v. *Baldwin* (1925) 18 Cr.App.R. 175, C.C.A.; *R.* v. *Eidinow* (1932) 23 Cr.App.R. 145, C.C.A.

(b) *To caution the defence* that the limits of safety may be overreached in the making of imputations against prosecution witnesses.[21]

(c) *To exercise his discretion* whether to allow cross-examination of the accused as to his past record.[22]

§ 20. Evidence to establish witness's good reputation

Where in the course of cross-examination of the prosecutor or a prosecution witness imputations are made against the character of the witness, the prosecution will not be allowed to call evidence to prove that the witness is a person of good general reputation.[23]

§ 21. Right to prove previous convictions

If an accused, properly cross-examined under section 1 (*f*) of the Act, denies a previous conviction that is put to him, it seems that the conviction may be proved by the prosecution.[24]

§ 22. Limits to cross-examination let in by imputations [25]

The cross-examination which is rendered exceptionally admissible by imputations within the meaning of section 1 (*f*) (ii) is cross-examination tending to show that the accused " has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character." [26] Difficulties have arisen as to the meaning in this context of " charged " and as to the permissibility of cross-examination as to previous charges.

In section 1 (*f*) the word " charged " means " ' accused before a court ' and not merely ' suspected or accused without prosecution.' " [27] Accordingly, the making by the defence of imputations within the meaning of the section would not justify cross-examination of the accused tending to show that he has previously been suspected or accused, otherwise than before a court, of having committed other offences.

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[20] *R.* v. *Ellis* [1910] 2 K.B. 746, at 764, C.C.A.; *Stirland* v. *D. P. P.* [1944] A.C. 315, at 327, H.L.

[21] See *R.* v. *Cook* [1959] 2 Q.B. 340, at 349, quoted in § 18 (b), above; and *R.* v. *Morris* (1959) 43 Cr.App.R. 206. But see *R.* v. *Brown* (1960) 44 Cr.App.R. 181, at 187: there the accused was represented by very experienced counsel and the absence of a warning was held not to be in any way unfair.

[22] See above, § 10 (b), and Part IV, *passim.*

[23] *R.* v. *Wood* (1951) 35 Cr.App.R. 61, Morris J.

[24] Criminal Procedure Act, 1865 (Denman's Act), s. 6; *R.* v. *Butterwasser* [1948] 1 K.B. 4, at 6–7, *per* Lord Goddard C.J.

[25] See also above, page 143, note 5.

[26] s. 1 (*f*) of the Act.

[27] *Stirland* v. *D. P. P.* [1944] A.C. 315, at 321.

Nor, generally, where the accused has thrown away the shield afforded to him by the general words of section 1 (*f*) (as by making imputations within the meaning of the section), will cross-examination as to his having previously been merely charged with, though not convicted, of another offence be admissible. The general words of the provision, excluding cross-examination as to previous record and bad character, are mandatory; the exceptions are not, and cross-examination alleged to be rendered admissible by, for instance, imputations within section 1 (*f*) (ii) must satisfy the general test of relevancy. It will do so if it tends to impair the credibility of the accused as a witness. The fact that a man has been charged with and acquitted of an offence does not affect his credit. Questions tending to show that the accused, the nature or conduct of whose defence has involved imputations on the character of the prosecutor or a prosecution witness, has been charged with the commission of other offences, are therefore inadmissible save in exceptional cases.[28] (This principle is independent of the wider judicial discretion, already considered, to disallow cross-examination rendered admissible, as a matter of law, by the second limb of section 1 (*f*) (ii).)

VI. Matters Arising on Appeal

§ 23. Cross-examination admitted on wrong ground

The fact that cross-examination of the accused on his previous convictions was allowed by the trial judge for some reason which was in itself insufficient will be no ground of appeal if in fact such cross-examination was legally admissible for some other reason.[29]

§ 24. Objection not taken by defence at trial

Counsel for the defence should object at the trial to an improper cross-examination of the accused as to previous convictions or bad character: "[It] is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal."[30] The fact that the objection was not taken at the trial will be a circumstance to be considered by the Court of Criminal Appeal when the point is taken that the cross-examination was improperly admitted, and may have a bearing upon the question whether the appellant should now be entitled to take the point,[31] and on the question whether the appellant was really prejudiced.[32]

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[28] This paragraph is intended to state, so far as is relevant to a case involving imputations within the meaning of s. 1 (*f*) (ii), the effect of *Maxwell* v. *D. P. P.* [1935] A.C. 309, especially at 316–320. See also *R.* v. *Wadey* (1935) 25 Cr.App.R. 104; *R.* v. *Sugarman* (1935) 25 Cr.App.R. 109; *R.* v. *Savory* (1942) 29 Cr.App.R. 1; *R.* v. *Nicoloudis* (1954) 38 Cr.App.R. 118; all of these, like *Maxwell's* case itself, were cases in which the accused had given evidence of his own good character. For suggested exceptional cases, see *Maxwell's* case at 320–321, and *R.* v. *Waldman* (1934) 24 Cr.App.R. 204, C.C.A.

[29] *R.* v. *Clark* [1955] 2 Q.B. 469, at 473, C.C.A.

On the other hand, the absence of objection, or the failure to ask for a fresh trial before another jury where the cross-examination has been wrongly received, is not conclusive of the right to raise the objection on appeal,[33] the more particularly because the trial judge himself has a duty to stop improper questions even in the absence of objection by counsel,[34] and because a rule precluding appeal after a failure to object at the trial might result in a miscarriage of justice.[35]

§ 25. **Wrong exercise of discretion**

If the trial judge permits cross-examination of the accused under the section without exercising the discretion he possesses to allow or disallow that cross-examination, the Court of Criminal Appeal, in deciding whether it was properly admitted, will exercise its own discretion.[36]

Where, however, the judge has allowed the cross-examination in the exercise of his discretion, the fact that the Court of Criminal Appeal would have exercised its discretion differently is not a sufficient reason for holding that the cross-examination was improperly admitted.[37] For the wrong exercise of the discretion to constitute a ground of appeal, it must appear that the judge erred in principle or that there was no material upon which he could have reached his decision to permit the cross-examination.[38]

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[30] *Stirland* v. *D. P. P.* [1944] A.C. 315, at 328, *per* Viscount Simon L.C., H.L.

[31] *R.* v. *Hudson* [1912] 2 K.B. 464, at 468, C.C.A.; *R.* v. *Bridgewater* [1905] 1 K.B. 131, at 135, C.C.A.

[32] *Stirland* v. *D. P. P.* [1944] A.C. 315, at 328.

[33] *R.* v. *Hudson*, *ubi sup.*; *Stirland* v. *D. P. P.* [1944] A.C. 315, at 327, distinguishing *R.* v. *Wattam* (1941) 28 Cr.App.R. 80, C.C.A.

[34] *Stirland* v. *D. P. P.* [1944] A.C. 315, at 327, referring to *R.* v. *Ellis* [1910] 2 K.B. 746, at 764.

[35] *Stirland* v. *D. P. P.* [1944] A.C. 315, at 328.

[36] *R.* v. *Cook* [1959] 2 Q.B. 340, C.C.A.

[37] *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1, C.C.A.

[38] *R.* v. *Cook*, above; and see *R.* v. *Brown* (1960) 44 Cr.App.R. 181, C.C.A.

§ 26. "Applying the proviso"

Where the ground of an appeal to the Court of Criminal Appeal is the improper admission of evidence as to the appellant's previous convictions or bad character, and the court "are of opinion that the point raised in the appeal might be decided in favour of the appellant," the court may nevertheless "dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."[39] There are a few cases in which the court or the House of Lords have dismissed appeals on this ground[40]; and cases[41] which suggest that the "proviso" cannot be or has never been applied in such an appeal are to this extent misleading.

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[39] Criminal Appeal Act, 1907, s. 4 (1), proviso.

[40] *R.* v. *Beecham* [1921] 3 K.B. 464, C.C.A.; *Stirland* v. *D. P. P.* [1944] A.C. 315, H.L.; *R.* v. *Cook* [1959] 2 Q.B. 340, C.C.A. There will be no miscarriage of justice, and the proviso may accordingly be applied, if "it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken": *Stirland* v. *D. P. P.*, above, at 321. This test makes it unnecessary to ask the more difficult question whether the jury, in returning a verdict of guilty, may have been influenced by the evidence improperly admitted: 60 L.Q.R. 307.

[41] *R.* v. *Turner* [1944] K.B. 463, at 471 ("we are not aware of any precedent for applying the proviso in a case where cross-examination to character has been deliberately admitted by the trial judge"); *R.* v. *Butterwasser* [1948] 1 K.B. 1, at 9 (*per* Lord Goddard C.J.: "when evidence is given with regard to the bad character of the prisoner which ought not to have been given, in my experience this court has always quashed the conviction.").

Obscenity, the Law and Lady Chatterley—II

By CHARLES D. L. CLARK,
Barrister-at-Law

(*Continuation of an article printed at* [1961] Crim.L.R. 156)

Part I of this article ended with the passing of the Obscene Publications Act, 1959. Before we move on to the trial of Penguin Books, Ltd., it is convenient to set out those provisions of the Act which have most bearing on the case. They are sections 1 (1) (3) (*a*) and 4.

" 1.—(1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."

" (3) For the purposes of this Act a person publishes an article who—

(*a*) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire ; "

" 4.—(1) A person shall not be convicted of an offence against section two of this Act, and an order for forfeiture shall not be made under the foregoing section, if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.

(2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground."

Preparation for the publication of the complete version

The date on which the Act received the Royal Assent closely followed the American decision by District Judge Bryan on July 21, 1959, in favour of the Grove Press unexpurgated edition of *Lady Chatterley's Lover*. At the end of August 1959 the Obscene Publications Act came into effect and by autumn Penguin Books were planning to celebrate the thirtieth anniversary of Lawrence's death by publishing about six of his novels and reprinting their collection of his poems. (The firm had similarly celebrated the twentieth anniversary in 1950 by publishing ten of Lawrence's works together.) The passing of the Act, which is by its preamble aimed "to provide for the protection of literature," and the success of Grove Press in America were probably major factors in the firm's decision to include the *unexpurgated* version of *Lady Chatterley's Lover* in the celebration group planned for publication in June 1960. The firm had refused to publish the well-known *expurgated* version as part of the 1950 celebration because its policy with novels had always been, and still is, to offer only complete editions.[1]

At all events, by January 1960 the die was cast and plans were put in hand for publication in June 1960 of *The Trespasser*, *Twilight in Italy*, *England My England*, *The Ladybird*, *Lady Chatterley's Lover*, *Women in Love* and a reprint of *Selected Poems*.

Press comment

News of Penguin's plans brought immediate response from the Press. The *Daily Express* was first off the mark on January 7, 1960, with an accurate factual statement, which was picked up by the evening papers. Over the next few days Press reaction ranged from the horror of the *West Lancashire Evening Gazette*:

"... further stimulation of the instinct that leads to attacks on women, to offences against children, to all manner of sex crimes. . . ."

to an article by David Holloway in the *News Chronicle* on January 11 which was probably representative of the general liberal attitude:

"I, for one, hope Penguins will be able to go ahead and no action will be taken. But I hope also that it will imply only one thing—that *Lady Chatterley* should be published. I have no desire to plough through half a hundred imitations every year which have the rude words without the rudiments of literary art."

On February 2, Dr. Alan Thompson, the Labour M.P. for Dunfermline, asked the Attorney-General to give an assurance to the directors of Penguin Books that the forthcoming publication would not be the subject of criminal proceedings. The Attorney-General's written answer had at least the merit of brevity—"No."

February and March passed quietly, but on April 12 Penguins announced that Hazell, Watson and Viney, who were to have printed the novel, had told the publishers that they felt unable to carry out the contract. (This announcement followed shortly on Grove Press's final triumph on appeal in March 1960.) Not until the middle of May did Penguins find another printer, the Western Printing Services of Bristol, part of the Pitman empire.

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[1] Every Penguin fiction title carries the legend "complete and unabridged" with the sole exception of *Lady Chatterley's Lover* which is proclaimed to be "complete and unexpurgated"—a faintly smug variation.

June ushered in the silly season and two items are worth including. *Books and Bookmen* reported that a woman speaker in Oklahoma had discovered that the major problem in connection with smutty literature was how to keep it from the Boy Scouts who collect it in salvage drives: and *Field and Stream* carried the now famous review of the American edition of *Lady Chatterley's Lover*, the text of which runs as follows:

" Although written many years ago, *Lady Chatterley's Lover* has just been reissued by Grove Press, and this fictional account of the day-by-day life of an English gamekeeper is still of considerable interest to out-door minded readers, as it contains many passages on pheasant raising, the apprehending of poachers, ways to control vermin, and other chores and duties of the professional gamekeeper. Unfortunately, one is obliged to wade through many pages of extraneous material in order to discover and savour these side-lights on the management of a Midland shooting estate, and in this reviewer's opinion the book cannot take the place of J. R. Miller's *Practical Gamekeeping*."

But August brought sterner news. The *Sunday Times* of August 14 carried the news that Scotland Yard had asked Penguin Books when copies of *Lady Chatterley's Lover* could be made available. Behind the statement lay days of frantic activity at Penguins.

"Publication" for the purposes of the 1959 Act

On August 16 twelve copies of *Lady Chatterley's Lover* were handed by arrangement to Detective-Inspector Monahan by a representative of Penguin Books and this small ceremony was deemed to constitute publication of the book for the purposes of section 1 (3) (*a*) of the Act. Penguins therefore issued a statement to the Press Association on August 17 announcing that they anticipated legal action and warning the Press that they were of the opinion that the matter would be *sub judice* from the moment that process was served. On August 19 a summons was issued under the Act at Bow Street and served at the registered office of the company at Harmondsworth.

Penguin Books had meanwhile postponed distribution to the public in order to save booksellers the hazard of prosecution or seizure proceedings and asked for the return of all copies originally sent out to the trade in anticipation of publication on August 25. Press comment quietened down after the issue of the summons, although the *Spectator* in an editorial on August 26 attacked the sort of interpretation of the law of contempt which would result in the prevention of any discussion which might conceivably influence a juror. Mr. Louis Blom-Cooper in a letter to the *Spectator* suggested that if he were to write (and have published) a letter to the *Spectator* praising the literary merit of *Lady Chatterley's Lover*, both he and the publishers of the *Spectator* would be committing a contempt.

A strange choice for a test case

In the same issue a letter from Mr. Roy Jenkins, M.P., raised the central question which was to be asked again and again as the weeks went by. Official witnesses before the Select Committee had clearly stated that they would be unconcerned with works even on the borderline of literary merit so long as they were given increased powers to deal with the trade in pornography. The evidence of the Commissioner of Metropolitan Police is categorical:

MR. JENKINS: " Suppose that it were possible to get more effective means of proceeding against the really filthy stuff, would it be a matter of comparative indifference to the police what happened to the borderline stuff? "

THE COMMISSIONER: " Complete indifference."

MR. JENKINS: " Even if the position in getting prosecutions was made rather more difficult? "

THE COMMISSIONER: " Completely." [2]

Why then did the Director of Public Prosecution's Office choose as a major test case (and prosecuting counsel told the jury at the start of the trial that it *was* a test case) the publication by a company which is almost a national institution of a novel whose literary merit is incontrovertible? Treasury Counsel could scarcely have set themselves a more difficult task.

Penguin Books, Ltd. committed for trial

The summons was adjourned on August 25 to September 8 and on that date Penguin Books, Ltd., were committed for trial at the Central Criminal Court by Mr. R. H. Blundell. Mr. Mervyn Griffith-Jones, senior prosecuting counsel to the Crown at the Central Criminal Court, called brief formal evidence of the handing over of the twelve copies of *Lady Chatterley's Lover* by a director of Penguin Books to Detective-Inspector Charles Monahan on

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[2] Minutes of Evidence taken before the Select Committee, H. of C. No. 122, 1958, p. 89.

August 16, and of the serving of the summons on the company's distribution manager at the registered office at Harmondsworth.

Mr. Blundell agreed that he had received and read a copy of the book and accepted Mr. Griffith-Jones' contention that the book spoke for itself as providing evidence of a prima facie case. Mr. Richard du Cann for Penguin Books gave notice to the prosecution that the defence would be calling witnesses under section 4 (2) of the Act and Mr. Blundell then made the committal order.

The period from September 8 to October 20 when the case came up for hearing was enlivened by a change in personnel: on September 26 it was announced that Sir David Scott Cairns, who was to have led for Penguin Books, was to become a High Court judge. On September 27 Penguin's announced that his place would be taken by Mr. Gerald Gardiner, Q.C.

"The Unprosecuted"

Press comment was merely concerned with the personalities in the case, but one outstanding article appeared. The issue of the *Spectator* for September 23 contained a brilliant survey by Philip Oakes, entitled *The Unprosecuted*, of the sort of literature to which Detective-Inspector Monahan might profitably turn his attention—*Secret Confessions, Sir, Scantys, Physique Pictorial, Male, Man to Man*, etc. The October 1960 issue of *Actual Confessions* carried the following publisher's advertisement which gives some idea of the appetites for which these publications cater:

> " Now available to adventurous women who are not afraid to try the unusual. Banned when first published and still hard to get in the full-blooded version, this book tells all in clear, unashamed language. Everything is detailed, from the first approach to the final conquest. . . . Beautifully bound for permanent possession—a genuine collector's item."

And the book? Ovid's *Art of Love*.

What D. H. Lawrence would have said about *that* is not hard to guess. The issue in which it appeared came on sale for adults and minors alike on the day on which the trial of *Lady Chatterley's Lover* opened at the Old Bailey. Mr. Griffith-Jones who conducted the prosecution, had appeared in the four notorious 1954 cases "*The Philanderer*," "*Septembers in Quinze*," "*The Image and the Search*" and "*The Man in Control*." His opponent in *The Image and the Search* case, after the first disagreement of the jury, was Mr. Gerald Gardiner, Q.C., who now led for Penguin Books.

The trial of Penguin Books, Ltd.

The course of the trial itself is now all too familiar. The main contemporary references in the national press both to the trial itself and the period surrounding it are listed at the end of this article and may, it is hoped, be of some use to readers who require detailed knowledge of the court proceedings and public reaction to the prosecution.

The main points of legal interest which the trial brought out were the following.

The reading of the book by the jury

1. The jury read the book at the Old Bailey and not at home. Practice was not consistent before the trial, nor, it is submitted, is it right that there should be a hard and fast rule on the point. The judge must weigh the disadvantage of having the book read in the unnatural surroundings of a jury room against the advantage of ensuring that the jury is not subject to outside pressure while it actually reads the book. There is a very real dilemma here and the present writer has no doubt that Mr. Justice Byrne made the right decision. The flood of comment, from reasoned doubts to hysterical abuse, which followed the verdict suggests strongly that very few of the jury would have been able to read the book undisturbed (or perhaps unmolested is the right word) at home. In other less sensational cases the balance may tip the other way. The decision whether the book should be read at court or at home should obviously be made according to the individual circumstances of each case.

The work to be " taken as a whole "

2. Mr. Griffith-Jones in his opening address tried to read to the jury isolated " purple passages " before they had read the whole of the book for themselves and was stopped, on Mr. Gardiner's objection, by the judge. Presumably, in view of the wording of section 1 (1) of the Act, which requires the effect of the article in question to be " taken as a whole," this prohibition will now become standard practice.

Mens rea

3. The vexed question of criminal intent was argued at some length. Mr. Gardiner submitted that the fundamental maxim *actus non facit reum nisi mens sit rea* must be read into the Act and that therefore expert evidence as to Lawrence's intention in writing *Lady Chatterley's Lover* was admissible in order to rebut

the legal presumption of intent to deprave and corrupt. This plea was rejected by the judge as far as the issue of obscenity was concerned. He declared himself bound by the decision of the Court of Criminal Appeal in *R.* v. *de Montalk*,[3] which had concluded that there was nothing in the argument that intent to deprave was rebuttable. "In my view," said Mr. Justice Byrne, "I am bound by that decision. The result, therefore, is that all that has to be established by the prosecution is the publication of the article; and then, of course, section 1 of the Act of 1959 comes into operation, to be considered by the jury. In my opinion, it is not open to the defence to call evidence to prove that there was no intention to deprave or corrupt." [4]

Evidence about unprosecuted books

4. The case brought a ruling on the admissibility of evidence about other books which may prove difficult to apply (see the discussion of 5. below). Byrne J. held that reference to other books could not be made in order to show that more objectionable works were freely circulating unprosecuted, but that such reference *could* be made in order to establish literary merit. Holding himself bound on the former point by *R.* v. *Reiter*,[5] he said:

> "I want to make this quite plain, that although I agree that the literary merit of this book can be dealt with by comparing it, if necessary, with the literary merit or otherwise of other books, I am of the opinion that evidence cannot be led by the defence in order to indicate that other books are obscene but have not been the subject of a prosecution."

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[3] (1932) 23 Cr.App.R. 182.

[4] But see also *R.* v. *Shaw* [1961] 1 All E.R. 330. Where Mr. Justice Ashworth, giving the judgment of a Court of Criminal Appeal consisting of himself, the Lord Chief Justice and Mr. Justice Streatfeild, said: "If these proceedings had been brought before the passing of the Obscene Publications Act, 1959, in the form of a prosecution at common law for publishing an obscene libel, it would no doubt have been necessary to establish an intention to corrupt. But the Act of 1959 contains no such requirement. . . ." (It should also be noted that this case gives no help in resolving the ambiguity, commented on by Professor J. C. Smith at [1961] Crim.L.R. 178, over intention, since the defendant in *R.* v. *Shaw* was, as in *R.* v. *de Montalk*, both author and publisher.)

[5] [1954] 2 Q.B. 16; 38 Cr.App.R. 62; [1954] Crim.L.R. 384. In this case Lord Goddard quoted and adopted the following remarks from the judgment by the Lord Justice-General in the Scottish case of *Galletly* v. *Laird*, 1953 S.C.(J.) 16, at 26, 27: "The book itself provides the best evidence of its own indecency or obscenity or of the absence of such qualities. . . . The character of other books is a collateral issue the exploration of which would be endless and futile."

Sections 2 and 4 of the 1959 Act

5. The judge's interpretation of the relationship between section 2 and section 4 will probably be of immense importance in the future. Rejecting the argument that if a book was established as having *some* literary merit, then there was a watertight defence under section 4, he invited the jury to weigh in the balance, should they decide that the book was obscene, the merits of literary interest and the demerits of obscenity. This interpretation of the Act turned on the wording of section 4 (1):

> " . . . publication of the article in question is justified as being for the public good on the ground that it is in the interest of. . . ."

The establishment of literary merit does not *automatically* mean that publication is for the public good. To establish public good the jury must be persuaded that the literary merits are so high that they outweigh the obscenity. But the defence cannot examine witnesses on this point of public good. Witnesses called for the purposes of section 4 (2)

> " . . . cannot be asked to solve the question as to whether publication of the book is justified as being for the public good. That is a question for the jury and not a question for the witnesses to determine. The jury will determine that question from the evidence of witnesses as to the literary merit of the work in question."

This interpretation puts a heavy strain on the defence and later in this article a wide implication for the future is suggested.

The effect of the judge's ruling on court practice may well be that the defence will take every possible opportunity to establish intent beyond the confines of literary merit. (Evidence of intent *to establish literary merit under section* 4 had been allowed in a preliminary skirmish to the main battle over the intent to deprave and corrupt.) Through evidence ostensibly given for the purposes of section 4 (2) counsel will try to persuade the jury that the author was really writing a moral tract, publication of which would do the public a great deal of good indeed. The *really* expert witness will fuse evidence on comparison with other works and the author's intention, both under section 4, with oblique comments on public good. Mr. St. John-Stevas gave, at the trial of Penguin Books, a foretaste of what may be in store:

> "I have certainly read a great many books of a pornographic and obscene nature in connection with this study, and my judgment is, with regard to literary merit, that, of course, *Lady Chatterley's Lover* has nothing in common with those

> books. And I would use 'literary merit' there not only in the sense of the language but—I do not think this can be separated—the theme and method and the underlying morality of the book."

He was not cross-examined by Mr. Griffith-Jones who, as C. H. Rolph put it, "must have seen new perils looming in this fusion of literary merit, theme, method and underlying morality."

Literary merit

6. Byrne J. asked both Graham Hough and Professor Pinto what they understood by literary merit. Professor Pinto's off-the-cuff answer was neat: "Whether the artistry, the craftsmanship is adequate, and whether it succeeds in conveying the author's experience, and whether that experience is a significant experience." The definition has that sort of "nutshell" quality which may well be picked up in future cases.

Expert witnesses

7. Finally, when is a witness expert? The parade which the defence stage-managed was most impressive, but with the sole exception of the luckless Miss Scott-James, the prosecution was strangely reluctant to question its credentials. This was, after all, a test case and a little testing of expert status might have been interesting. The last witness, for example, Miss Bernadine Wall, was twenty-one years of age and had just come down from Cambridge University with an honours degree in English. She was starting a novel and had contributed to and helped to edit a special issue of *Twentieth Century*. All very admirable, but surely not enough to make her an expert witness on literature, still less on one particular author's merit. Perhaps it was because she was the last witness that the judge was lenient, but if the same licence is to be allowed in the future, is, as Mr. Griffith-Jones plaintively asked: "anybody with an Honours Degree qualified to speak as an expert?"

The expert witnesses were not allowed into court until each of them was called to give evidence. This exclusion probably helped the defence's case. In his closing speech, indeed, Mr. Gardiner actually regretted that he had ever suggested that they should not be excluded.

The implications of the trial

Nothing is to be gained by guessing how many of the jury were originally for or against the book, or why the prosecution produced no witnesses. But for two reasons the major implication of the trial goes a little beyond guesswork and may have very grave consequences on the free circulation of good literature.

First, the requirement that the book in question should be positively for the public good means that a book with none of the very obvious moral overtones of Lawrence's work is less likely to avoid conviction. What chance, one wonders, would a work like *Gargantua and Pantagruel* have if it were published in England for the first time in 1961 and prosecuted under the 1959 Act?

Secondly, the parade of over thirty witnesses might set a very tough precedent in the minds of future jurors. " Penguins " they may say, " got thirty-five witnesses (with none for the prosecution) for that test case, and these people can only produce seven: the book can't have much literary merit."

Both these points lead to the same conclusion. *It may be very much more difficult in the future for controversial works of some literary merit whose authors fall short of greatness, and which have few or no moral overtones, to obtain free circulation.* On the other hand, sadly enough, works of no literary merit which conform to and cater for the readership equivalent of the Soho striptease clientele seem likely to flourish. " Pure " pornography the police have already acted against. There have to date been eighty prosecutions and fifty-three forfeitures under the Act.

As a test case, *R.* v. *Penguin Books, Ltd.* has been hailed as a triumph for the forces of light. But when a really controversial book comes along, the forces of light may look back to the implications of the case with unease. The last laugh may after all be with Mr. Griffith-Jones.

CONTEMPORY SOURCES

Transcript of *R.* v. *Penguin Books, Ltd.* (obtainable from Penguin Books).

The Trial of Lady Chatterley, ed. by C. H. Rolph (*Penguin Books*).

" The Crooked Eye," by Noel Picarda (*Isis*, June 15, 1960).

" Mainly About Books," by Leonard Russell (*Sunday Times*, August 14, 1960).

" Very Dirty Books," by Bernard Levin (*Spectator*, August 19, 1960).

" Lady Chatterley Challenged " (*New Statesman*, August 20, 1960).

" The Prosecutors " (*Spectator*, August 26, 1960).

"The Unprosecuted" (*Spectator*, September 23, 1960).

"Book Censorship in the Commonwealth" (*The Author*, Autumn 1960).

The Times (October 21, 28, 29; November 1, 2, 3, 1960).

Guardian (November 3, 1960).

"Lady Chatterley and the Law," by Norman St. John-Stevas (*Daily Telegraph*, November 3, 1960).

"Lawrence Unbound," by Wayland Young (*Guardian*, November 4, 1960).

"The Lady's Not for Burning," by Bernard Levin (*Spectator*, November 4, 1960).

"A Man in His Senses" (*Times Lit. Sup.*, November 4, 1960).

"Lady Chatterley's Triumph," by C. H. Rolph (*New Statesman*, November 5, 1960).

"Lady Chatterley's Trial," by Kenneth Tynan (*Observer*, November 6, 1960).

"The Christian and Lady Chatterley," by the Bishop of Woolwich (*Time and Tide*, November 5, 1960).

"That Book: Are there Two Christian Moral Standards?" (*Methodist Recorder*, November 17, 1960).

"Chatterley, Witnesses and the Law," by Rebecca West, Richard Hoggart and others (*Encounter*, March 1961).

"*Beyond Reasonable Doubt*"

Defence of Drunkenness

(Based on *R.* v. *Thomas*, an Australian case)

By R. W. Cannon,
Solicitor, Supreme Court of Western Australia,
Deputy Registrar H.M. High Court of Uganda

The recent case of *R.* v. *Thomas*,[1] which came before the High Court of Australia sitting as a court of criminal appeal, is an added reminder of the dangers of any deviation from the time-honoured direction to a jury in a criminal case that they must be satisfied of the guilt of the accused " beyond reasonable doubt " before they are entitled to bring in a verdict of guilty.

The appellant, Robert Jeremiah Thomas, was convicted by a jury in the Supreme Court of Western Australia of the wilful murder of Keith Campbell Mervyn Wedd. An appeal by him to the state Court of Criminal Appeal, consisting of three judges, was unanimously dismissed. The High Court, however, granted special leave to appeal from the decision of the state court to the High Court.

The judge's direction to the jury

The appeal was based on a claim that the trial judge misdirected the jury as to the onus of proof on a charge of wilful murder. The particular words complained of came at the end of a passage in the summing up, near the conclusion of the trial judge's charge. Before using the words complained of, he had clearly instructed the jury that it was for the Crown to establish from the evidence the guilt of the accused beyond reasonable doubt. He added to this direction that they should " come to a feeling of comfortable satisfaction that the accused is guilty."

The material portion of the passage in the summing up of the trial judge reads as follows:

> " You have got to remember that the general onus in all these things is on the Crown, the onus is on the Crown to satisfy you that the accused is guilty, and the accused is entitled to the benefit of any reasonable doubt which you may

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[1] 33 Australian Law Journal Reports 413.

> have. There is no particular magic about the way you have got to consider it; no special rules. You consider it in an ordinary common-sense manner and in the way you would consider the more serious matters which come up for consideration and decision in your lives, and if considering it in that way you come to the conclusion—you come to a feeling of comfortable satisfaction that the accused is guilty, then you should find him so guilty, and that is the standard you should apply with the various verdicts which I have indicated to you, except of course to the extent that so far as insanity is concerned the onus is on the accused to satisfy you as to that on the balance of probability."

The judgment of the High Court

The High Court comprised of five judges came to the unanimous decision that the above words constituted a serious misdirection as to the burden of proof borne by the prosecution and allowed the appeal. A new trial was ordered.

A review of the reasons for the decision of the High Court reveals a wide divergence of view between the two appellate courts.

The accused at his trial raised two defences. On the first defence, the defence of insanity, the High Court held that the trial judge had correctly directed the jury that Thomas carried the burden of proving the defence, and the civil standard of proof applied. Thomas also raised the defence of drunkenness. Section 28 of the Criminal Code of Western Australia contains this provision:

> " When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional may be regarded for the purpose of ascertaining whether such an intention in fact existed."

There was therefore an issue whether Thomas was too drunk to form the intent to take the deceased's life or to cause him grievous bodily harm. This issue was of course included in the general issue raised by the plea of not guilty. If the jury had a reasonable doubt that Thomas by reason of mental disorder caused by intoxication was capable of forming either intent, it would have been their duty to give him the benefit of the doubt and find him guilty of manslaughter.

The meaning of " beyond reasonable doubt "

McTiernan J. in his judgment referring to that portion of the summing up beginning with the words " There is no particular magic " and ending with the words " the balance of probability " commented as follows:

> " There is no authority for the use of that verbiage to elucidate what is meant by proof beyond any reasonable doubt. The question whether a direction regarding the onus of proof is proper is not a purely verbal one. It is a question whether what the jury is told means that they must be satisfied beyond any reasonable doubt that the accused is guilty. But there is a danger in venturing upon a novel elucidation of this principle of the criminal law. It is dubious advice to tell the jury that no particular magic is required to perform their duty. . . . The expression ' the more serious matters which come up for consideration ' is vague. It would include a wide range of matters of various grades of seriousness. Experience of such matters is invaluable in the jury room but it is not right to tell the jury that they may decide whether the accused is guilty in the same sort of fashion as they decide serious matters that arise for their decision out of court. . . . I think the cardinal error was to tell the jury that if they arrived at a feeling of comfortable satisfaction that the accused was guilty, they should find him guilty, and then to add that such was the standard of proof."

Fullager J. in his judgment quoted with approval the remarks of Barton J. in *Brown* v. *The King*,[2] where he said—" one embarks on a dangerous sea if he attempts to define with precision a term which is in ordinary and common use with reference to this subject-matter, and which is usually stated to a jury without embellishment as a well understood expression."

" Comfortable satisfaction " of guilt

Referring to the words " comfortable satisfaction " he made the following comments:

> " Then, ' comfortable satisfaction ' has perhaps gained a certain currency, but even in civil cases it has little in my opinion to recommend it. It was used by Rich J. in *Briginshaw* v. *Briginshaw* [3] in relation to the standard of proof in cases where adultery is in issue. But his Honour was careful to distinguish the standard conveyed by that expression from the standard required in criminal cases and conveyed by the words ' proof beyond reasonable doubt.' In truth ' come to the

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[2] (1913) 17 C.L.R. 570, especially at pp. 584–586 and 594–596.

[3] (1938) 60 C.L.R. 336, at p. 360.

> feeling' referred to in his Honour's charge is by no means the same thing as being satisfied beyond reasonable doubt."

"Beyond reasonable doubt"—the defences of drunkenness and insanity

Kitto J., in his judgment, was equally emphatic that there had been a misdirection. He stated in his judgment:

> "it is clear that the onus was to satisfy the jury beyond reasonable doubt. Nothing in recent English cases should be taken as impairing this principle. It has been unequivocally stated by the House of Lords, for example in *Mancini* v. *Director of Public Prosecutions*,[4] plainly affirmed by the Privy Council, for example in *Bullard* v. *The Queen*,[5] and uniformly applied by this court, *May* v. *O'Sullivan*.[6] Whether a doubt is reasonable is for the jury to say; and the danger that invests an attempt to explain what 'reasonable' means is that the attempt not only may prove unhelpful, but may obscure the vital point that the accused must be given the benefit of any doubt which the jury considers reasonable. . . . In my opinion an attentive jury may very well have understood the passages as placing upon the previous references to proof beyond a reasonable doubt an interpretation or a gloss substantially lessening the severity of the true standard, and that therefore the appellant's conviction was by a jury which had not been instructed in accordance with the strict requirement of the law."

Windeyer J. was convinced that a jury has no difficulty in understanding what is meant by proof beyond reasonable doubt.

> "The expression proof beyond a doubt conveys a meaning without lawyers' elaborations. Othello's meaning was clear enough:
>
> '. . . so prove it,
> That the probation bear no hinge nor loop
> To hang a doubt on.'"

In his judgment he made the following comments:

> "The golden thread that runs throughout the web of English law is broken by the defence of insanity. It is better to recognise this than to rationalise it. . . . Drunkenness so great as to make the accused incapable of forming the specific intent necessary for the commission of a particular offence

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[4] [1942] A.C. 1, at p. 11.
[5] [1957] A.C. 635, at p. 642; [1957] Crim.L.R. 816.
[6] (1955) 92 C.L.R. 654.

> has some obvious resemblance to insanity as a defence. But the distinction in law between incapacity by drunkenness and insanity, a disease of the mind, remains. The burden of proof is different. When drunkenness is relied upon as a defence 'the golden thread' is unbroken."

Referring to the passage in the summing up to which objection was taken he stated as follows:

> "I would point out that many of his Honour's phrases taken by themselves are not without precedent and approval. The reference 'to the more serious matters that come up for consideration and decision in your lives' is somewhat weaker than Chief Baron Pollock's 'that degree of certainty with which you decide upon and conclude your own most important transactions in life.' And it is not without significance that the editors of *Foster & Finlason's Reports* wrote in 1867 that that direction 'somewhat startled the profession' because it was a departure from 'the old, safe, well-established rule' that the jury should be satisfied beyond all reasonable doubt of the prisoner's guilt. (See footnote to *R.* v. *White and Others*.[7]) Attempts by paraphrase and embellishment to explain to juries what is meant by satisfaction beyond reasonable doubt are not always helpful and explanation is not always necessary. In my view it is not desirable that the time-honoured expression 'satisfied beyond reasonable doubt' should be omitted and some substitute adopted. It is said that it was 'invented by the common law judges for the very reason that it was capable of being understood and applied by men in the jury box' (quoted in Wigmore [8])."

The learned judge further criticised any departure from these words "satisfied beyond reasonable doubt" in the following terms:

> "For generations jurymen have been directed in terms of 'reasonable doubt' 'moral certainty' and 'the benefit of the doubt.' Now it is suggested in England, mainly by Lord Goddard, that these phrases should be abandoned. The third edition of Halsbury [9] goes so far as to say that the phrase 'reasonable doubt' should be avoided. (See, among other cases, *R.* v. *Summers* [10]; *R.* v. *Onufrejczyk*.[11]) With great respect for those whose great experience has led them to this view, I think it would be unfortunate if it were adopted in

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[7] (1865) 4 F. & F. 383.

[8] s. 2497, 3rd ed., Vol. IX, p. 323.

[9] Vol. 10, p. 424.

[10] [1952] 1 All E.R. 1059; 36 Cr.App.R. 14.

[11] [1955] 1 Q.B. 388, at pp. 394–395.

> Australia. . . . The best and plainest way to give it (the direction) is I venture to think to tell the jury that they must be satisfied beyond reasonable doubt. In the same case [12] it was said that there is 'no prescribed formula'—in *Bullard* v. *The Queen* [13] it becomes 'no magic formula.' But that no particular form of words is prescribed does not mean that an old and well-known expression is to be ignored."

His Honour deprecated the use, in a criminal trial, of the phrase "comfortably satisfied" which he referred to as having come somewhat "into vogue in divorce proceedings."

Differences between the two appellate courts

For the above reasons the High Court ordered a new trial. The fact that the state Court of Criminal Appeal came to the unanimous decision that the words in the summing up referred to "do not admit of any misconception if they are taken with the passage to which they belong" whereas the High Court considered that the objection taken was "fundamental," emphasises the wide divergence of views between the two appellate courts. Certainly the High Court has now placed the matter "beyond reasonable doubt" and the "magic formula" is in fact the use of those words without gloss or embellishment. The procedure adopted by the judge in the English case of *R.* v. *Spriggs*,[14] whereby the trial judge instead of giving the jury a direction on the meaning of "abnormality of mind" and "mental responsibility" merely handed to them slips of paper with the words of the section written on them and instructed them that it was for them to say whether the case came within the section's terms, has not been adopted with respect to a direction on the burden of proof, but it would appear that judges in Australia would do well not to depart in any way from the words "proof beyond reasonable doubt."

Onus of proof where the defence of drunkenness is raised

The High Court further pointed out the difficulties which arise when the jury are asked by the defence to infer either insanity or an absence of intent because of drunkenness or both from the same set of facts. They made it quite clear that in view of the fact that the onus of proving the defence of insanity lay upon the accused, it was the more important that the jury should understand that in all other matters—including the intent to kill or cause grievous bodily harm in the case of a man whose mental capacity the defence claimed had been impaired by drink—the onus was without qualification upon the Crown to satisfy them beyond all reasonable doubt. Misdirections in such cases are by no means uncommon as can be seen from recent decisions of the Court of Appeal for Eastern Africa. In two recent cases, *Malungu s/o Kieti* v. *R.*[15] and *Nyakite s/o Oyugi* v. *R.*,[16] the appellate court found a misdirection on this question of onus of proof where the defence of intoxication was raised.

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[12] Referring to *Mancini* v. *D. P. P.* [1942] A.C. 1, at p. 13.

[13] [1957] A.C. 635, at p. 645.

[14] [1958] 1 Q.B. 270; [1958] Crim.L.R. 190.

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[15] [1959] E.A. 797 (C.A.).

[16] [1959] E.A. 322 (C.A.).

A Scottish Newsletter

By a Scots Advocate

Criminal statistics

The annual statistics for 1960 relating to the work of the High Court of Justiciary in Scotland confirm the impression that serious crime is on the increase, and is becoming more widespread. The High Court, which deals with the major crimes, was required to go on circuit to the various circuit towns throughout Scotland on no less than twenty-one occasions, which was a clear record. In Glasgow eight separate sittings were required, instead of the usual six. There were nineteen persons indicted for murder in 1960 on the Glasgow circuit alone, whereas in the twelve months before the Homicide Act came into force in 1957, there was only one in the whole of Scotland. Out of a total of twenty-nine murder indictments, only four were capital. All four were convicted, but only one was executed. In the non-capital cases, two were sentenced to life imprisonment, sixteen were found guilty of culpable homicide (manslaughter), one was detained during Her Majesty's pleasure, being under sixteen, two were found insane, and two were acquitted. The continued rise in these statistics must give cause for growing concern.

Protecting livestock and game

There have been several cases concerning the protection of livestock and game, and the courts have had to consider the legal meaning of such deceptively simple expressions as " chase," and " using " a gun. The Dogs (Protection of Livestock) Act, 1953, provides that the owner of a dog is guilty of an offence if a dog worries livestock on any agricultural land. Section 1 (2) of the Act defines " worrying livestock " as " (*a*) attacking livestock, or (*b*) chasing livestock in such a way as may reasonably be expected to cause injury or suffering to the livestock, or in the case of females, abortion, or loss of or diminution in their produce."

In *Stephen* v. *Milne*[1] the sheriff substitute had found a farmer guilty under the Act, where it was found proved that the dog was running through the sheep, scaring them and causing them to dash about the field, but it was not found proved that the dog had chased the sheep. The farmer appealed to the High Court, where it was argued that as no pursuit had been proved, the dog could not be said to have been "chasing" livestock, within section 1 (2) (*b*).

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[1] 1960 S.L.T. 276.

The Lord Justice General (Clyde) in his judgment said that "chasing" was a word of various meanings, and while in one sense it involved pursuing, there were wider meanings. Chasing could mean putting to flight, and if putting the sheep to flight was such as might reasonably be expected to cause injury to them, that was an offence.

The Protection of Birds Act, 1954, was used to secure a conviction in unusual circumstances. Section 5 of the Act makes it an offence for anyone to use a mechanically propelled vehicle in immediate pursuit of a wild bird for the purpose of driving, killing or taking the bird. In *Hawthorn* v. *Cramb* [2] it was proved that three men set off in a car on a poaching expedition. The car was stopped at the side of a field containing pheasants, one of the men got out, and fired at the birds unsuccessfully, then got into the car again and drove away. The sheriff substitute found the men not guilty on the ground that there was no evidence to indicate that they had intended to shoot at the pheasants from the motor-car. The Crown appealed, and argued that while it might not be an offence merely to use the car to bring them to the vicinity of where they wished to shoot, it was an offence under the Act to use the car to stalk the pheasants. The court agreed that an offence had been committed, although Lord Sorn expressed his surprise that an Act of this nature should be applied to the situation before the court.

In another poaching case, *Gray* v. *Hawthorn*,[3] two men were charged under the Poaching Prevention Act, 1862, which makes it an offence for any person to have "used" any gun "for unlawfully killing or taking game." The sheriff substitute found that there was evidence that the men had illegally gone onto land without permission in search of game, and that when they were apprehended on the main road by the police, they were carrying air guns. One witness had heard shots from the area into which the men had gone, but that was insufficient to establish where the accuseds' guns had actually been fired. The two men were convicted and appealed to the High Court. The question was whether a gun could be "used" for poaching without actually being fired. It was argued for the accused that the possession of a poaching instrument which had not been used was insufficient in itself—

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[2] 1960 S.L.T.(Notes) 53.

[3] 1961 S.L.T. 11; see below, p. 265.

Procurator Fiscal v. *Ferguson*.[4] The Crown replied that it was not essential that persons in possession of weapons should have been seen on the land in search of game—*Mackenzie* v. *Lockhart*.[5] The court dismissed the appeal and the Lord Justice Clerk Thomson said that it would make a nonsense of the statute if it were said that a gun was being used only if it was actually fired.

Tape recorders as evidence

One continues to marvel at the growing ingenuity of the police in their constant war against crime. They secured the necessary evidence in a case of blackmail recently, *Hopes and Another* v. *H.M. Advocate*,[6] in an unusual way. The police provided the blackmailer's victim with a lapel microphone and a pocket battery operated radio transmitter. A meeting between the blackmailer and his victim was arranged in a public railway station, and incriminating statements made by the blackmailer to his victim were transmitted by radio to another part of the station, where they were overheard by police officers, and also recorded on tape. At the subsequent trial of the blackmailer, the Crown offered evidence not only from the police officers of what they had heard over the loudspeaker, but also of the tape recording itself, and a police stenographer's "rendering" of the conversation. This rendering was in fact a transcript which the stenographer had prepared after hearing the tape played over several times. The presiding judge allowed the jury to hear evidence both from the police and the stenographer, and also allowed the recording to be played in court. The accused appealed to the High Court on the ground that the tape recording itself was the best evidence, and the evidence from the other two sources should have been disallowed. Lord Justice General Clyde said that the evidence of the police of what they had heard transmitted over the radio was perfectly competent evidence, and that there was nothing improper or underhand in eavesdropping of this kind. His lordship did, however, regard the evidence of the stenographer as "very doubtfully competent." The court were of the view that in future, where transcripts of recordings were to be offered in evidence, they should wherever possible have been made by persons with pre-existing qualifications for such a task.

Tape recordings were also used in evidence in a subsequent case in Glasgow Sheriff Court (*P. F.* v. *Wyse and Another*, December 5, 1960). A man and a woman were charged with attempting to procure an abortion for a Miss X. The police arranged that Miss X should meet the man in her flat, and their conversation, containing incriminating remarks by the accused, was transmitted via pocket radio to a police car in the street nearby, where it was also recorded. The police also monitored and recorded telephone conversations between the woman and Miss X. These recordings were admitted as evidence, despite objections, and both accused were convicted.

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[4] (1885) 1 S.L.R. 378.

[5] (1890) 18 R.(J.) 1.

[6] 1960 S.L.T. 264; [1960] Crim.L.R. 566.

The case of the tracker dog

Tape recorders are not the only unusual method now being adopted by the police to secure convictions. In *Patterson* v. *Nixon*[7] the Appeal Court decided that evidence regarding the conduct of a police tracker dog, taken along with certain admissions and explanations by the accused, were sufficient to justify his conviction. The accused had been charged with breaking into a house with attempt to steal. The dog and his handler were taken to the house where the dog took note of the scents. Later the dog was taken to the common entry of a tenement property which contained six separate dwellings, and in which building the suspect was believed by the police to be living. The dog went freely and unerringly to the door of the accused. In a subsequent test, the dog successfully picked out the accused's shoes from six other pairs—since all these other pairs were policemen's shoes, perhaps this test was not quite so impressive, but it was still no mean feat. In sustaining the conviction, Lord Justice Clerk Thomson said that the evidence of what a tracker dog did and as to its skill and reliability had to be weighed just like any other evidence.

The dog in the case was an Alsatian, which had been trained at the London Metropolitan Police Force Training School. The training there for dogs includes searching, tracking, manwork, and discrimination and detection of the scent of persons and the tracking of them by the scent each person has. The period of training for the dog and the police officer who alone can handle it lasts for three months. When scenting and tracking, the dog may be put on a lead 40 feet in length with a harness and shoulder strap running down the back of its neck; it is then given the command "track, seek," and is allowed to run free on the lead in order to follow the trail.

Recalling a Crown witness

In a summary criminal trial in Glasgow Sheriff Court, two policemen gave evidence for the prosecution, but only one of them was asked to identify the accused. Later, and before the Crown case was closed, the prosecutor sought to recall the other constable to corroborate the identification of the accused, and the sheriff allowed him to do so. Permission was given on the strength of section 4 of the Evidence (Scotland) Act, 1852, which provides that the presiding judge may, on the motion of either party, permit a witness to be recalled. The accused was convicted, and appealed to the High Court (*Todd* v. *Macdonald*[8]) where it was argued that the general provisions of the 1852 Act were qualified by the provisions of the common law, under which only the judge was entitled to recall a witness, and only for the purpose of clearing up ambiguities in the earlier evidence of the witness.[9] The court refused the appeal, and distinguished the common law right of the judge to recall a witness at any time during the trial—the witness being the judge's witness, and questioned by the judge only, and the right given under the 1852 Act to either party to recall and examine the witness before their case is closed. The court agreed, however, that it was probably not competent for a party to recall a witness after his case was closed.

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[7] 1960 S.L.T. 220; [1960] Crim.L.R. 634.

A game of housey-housey

Many people have criticised the popularity of tombola, or housey-housey as it is more popularly known, as being a social evil, which brings men and women out of their homes filled with gambling fever, and down to their local clubs, to the neglect of their family and household responsibilities. The Burgh Prosecutor in Edinburgh eventually brought a test case, *Bow* v. *Heatly*,[10] to determine the legality of such games in private and social clubs. The accused were convicted in the summary court but were successful on appeal.

Section 4 of the Small Lotteries and Gaming Act, 1956, gives protection in certain circumstances to people who run games of one kind or another for charitable purposes. Section 4 in fact applies to " any entertainment promoted in Great Britain for raising money to be applied for purposes other than purposes of private gain, being an entertainment at which games of chance or chance and skill combined are played." The legal question in the case was whether the Act gave protection on the occasion where the only entertainment offered was in fact the game of chance. In other words, were the charitable promoters of housey-housey entitled to run the game in their club, and provide no other entertainment?

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[8] 1960 S.L.T.(Notes) 93.

[9] See Renton on *Brown, Criminal Procedure*, p. 118.

[10] 1960 S.L.T. 311; [1960] Crim.L.R. 838.

There appear to be no authorities which could be relevantly quoted in argument, but the court took the commonsense and plain man's view that entertainment meant amusement, and that obviously included a function at which people played or watched housey-housey being played. The decision in this test case was of importance to social and welfare clubs throughout Scotland, and was generally welcome.

The pound of flesh

Hardly anybody goes to the moneylenders nowadays, or so they say. The moneylender has been largely replaced by hire-purchase or personal credit schemes. One such a credit scheme was operated by a firm of retail merchants with a chain of forty shops throughout industrial Scotland, under which the customer was charged interest at 2 per cent. per month on the highest amount outstanding against him during the preceding month. In addition to selling their own merchandise to customers through the scheme, customers and those not yet customers were invited to use the credit scheme to assist them to purchase goods from other traders, or even to use the scheme for the purpose of discharging outstanding debts to other persons. The company also advertised their scheme in local newspapers and invited customers to obtain goods and repay through the scheme.

The firm were eventually charged with contravening section 5 (2) of the Moneylenders Act, 1927, which makes it an offence to publish in a newspaper any advertisement containing an invitation to borrow money from a moneylender. The firm pleaded that they were entitled to exception under section 6 (*d*) of the Moneylenders Act, 1900, which provides that the expression moneylenders shall not include a person " bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money."

During the course of the trial, the sheriff scrutinised the objects of the firm as laid out in their Memorandum of Association, and decided that the balance of evidence showed that the firm's main business was retail merchandising, and only a small part of their business was related to the lending of money. The sheriff also found that the firm, by lending money to customers to discharge their debts to other merchants, hoped to earn the goodwill of customers and increase their trade in that way. The firm was therefore found not guilty.

The case was *Macdonald* v. *N. G. Napier, Ltd.*,[11] and the Crown took the case to appeal in the High Court where it was argued that to fall within the proviso of the 1900 Act, the loans must be directly incidental to the main business—*Edgelowe* v. *MacEllee*.[12] Counsel for the firm relied upon *Khoon's Official Assignee* v. *E. K. Liong Hin, Ltd.*,[13] where it was said that the exemption applied where the lending transactions were undertaken generally for the purposes of the business, that is, with the object of preserving, advancing or otherwise assisting the business.

The court, albeit reluctantly, refused the appeal, and the Lord Justice General suggesting rather ominously that there were prima facie strong grounds for holding that the firm's actions should be treated as those of a moneylender, but the law needed an amendment to bring it in line with modern developments, and that was a matter for Parliament rather than the courts.

The reasonable golfer

In English law, the reasonable man is traditionally described as " the man on the Clapham Omnibus." This expression means very little to a Scots lawyer, but the situation seems to have been remedied by the adoption of the concept of the " Man on the First Tee," or the reasonable golfing man. The concept was recently introduced to Scots law by the Lord Justice Clerk, himself a keen golfer, when he said in *Blaikie* v. *The British Transport Commission*.[14]

" The whole virtue of the reasonable man is that he functions normally in a normal world. . . . The reasonable man goes round in bogey because he plays the orthodox shots, is never in trouble and is not called on to do the unexpected."

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[11] 1960 S.L.T. 345; [1961] Crim.L.R. 174.
[12] [1918] 1 K.B. 205.
[13] [1960] A.C. 178.
[14] 1961 S.L.T.(Notes) 16.

Practice and Procedure

PRACTICE NOTE

Corrective training

The Lord Chief Justice at the sitting of the Court of Criminal Appeal on February 20, 1961 ([1961] 1 W.L.R. 463), gave the following practice direction with regard to the term of a sentence of corrective training. In *R.* v. *Grant* (1950) 34 Cr.App.R. 230, it had been laid down that the minimum sentence of corrective taining should be for three years. The court had now been informed that, as a result of experience, the Prison Commissioners had found it possible to provide a training which could be effected in a two years' sentence. It was, therefore, open to the sentencing court to impose a sentence of two years' corrective training if they felt that that would be likely to provide an adequate period of training for the person concerned; and the Court of Criminal Appeal would no longer set aside the sentence merely because it was a two-year sentence.

Preventive detention

R. v. Clarkson

Court of Criminal Appeal: Lord Parker C.J., Salmon and Winn JJ.: [1961] 1 W.L.R. 347.[1]

C. was sentenced at quarter sessions to seven years' preventive detention. The qualifying convictions relied on and set out in the notice of previous convictions were convictions in Scotland, but no evidence was given to establish that those convictions were on indictment or punishable by two years' imprisonment or more. On appeal to the Court of Criminal Appeal:

Held, that by section 21 (2) (*b*) of the Criminal Justice Act, 1948, the previous offences which qualified an offender for preventive detention must have been convictions on indictment of offences punishable on indictment by imprisonment for two years or more. By section 23 (3) provision was made for a certificate purporting to be signed by or on behalf of the Lord Advocate, certifying that an offence was punishable on indictment in Scotland with two years' imprisonment or more, to be evidence of the matter so certified. Such a certificate had, in fact, been obtained in the present case but, in error, it had not been put in. It was, therefore, said on the appellant's behalf that, Scottish law being a question of fact, the conditions precedent to a sentence of preventive detention had never been established. This court had, with considerable reluctance, come to the conclusion that at least prima facie evidence must be given that the conditions set out in section 21 (2) (*b*) had been complied with before a sentence of preventive detention could be imposed. Accordingly, the court had no option but to set aside the sentence of preventive detention and to substitute therefor a sentence of imprisonment. [H. P.]

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[1] For the appellant: *M. O. L. Worsley* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *H. J. Leonard* (instructed by the Solicitor, Metropolitan Police).

Corrective training

R. v. Caven

Court of Criminal Appeal: Lord Parker C.J., Salmon and Winn JJ.: [1961] 1 W.L.R. 347.[2]

In this case, in which the appellant had been sentenced to three years' corrective training, the court followed their decision in *R.* v. *Clarkson*, *ante*, p. 249, holding that there must be prima facie evidence that the conditions laid down by section 21 (1) (*b*) of the Criminal Justice Act, 1948, had been complied with before a sentence of corrective training can be imposed. [H. P.]

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[2] For the appellant: *M. D. L. Worsley* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *H. J. Leonard* (instructed by the Solicitor, Metropolitan Police).

Case and Comment *

ARREST

Prevention of Crimes Amendment Act, 1885, s. 3—obstructing the police—Metropolitan Police Act, 1839, s. 54—obstruction of the thoroughfare

Gelberg v. Miller

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Streatfeild, Slade, Ashworth and Elwes JJ.: [1961] 1 W.L.R. 153.[1]

G. parked his car outside a restaurant in London whilst he had a meal. When he came out of the restaurant, police officers were inspecting the car. They twice asked him to remove the car, and on each occasion he refused to do so. He was told that if he did not remove it, one of the police officers would. G. then removed the rotor arm and returned to the restaurant. After about three minutes he returned, and began to replace the rotor arm. One of the officers asked him to produce his driving licence and certificate of insurance and to give his name and address. G. refused to do so. The officer told him that he was going to arrest him for obstructing him in the exercise of his duty; and then arrested him.

The magistrate convicted G. of obstructing the officer in the execution of his duty, contrary to section 3 of the Prevention of Crimes Amendment Act, 1885, and dismissed an information, laid by G., alleging assault by the police officer. On appeal by G.,

Held, dismissing the appeal, that G. had wilfully caused an obstruction of the thoroughfare, within the meaning of section 54 (6) of the Metropolitan Police Act, 1839, so that there was, prima facie, a power of arrest under that section; that G. either knew or had been told sufficient to fulfil the obligation to inform G. of the reason for his arrest; and that the arrest was, accordingly lawful.

[D. C.]

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For G.: *Stanley Brodie* and *John Prophet* (instructed by Humphrey Razzell & Co.). *Paul Wrightson* (instructed by Solicitor, Metropolitan Police). *Sir Reginald Manningham-Buller, Q.C., Att.-Gen.* and *J. R. Cumming-Bruce* as *amici curiae.*

Commentary. The important constitutional issues relating to the general power of arrest, which the case seemed likely to raise, did not, in the end, fall to be decided by the court of five judges called to deal with them. The case was decided on the basis of the particular power of arrest conferred by section 54 of the Metropolitan Police Act, 1839.

G. was not charged with an offence under that section and the court accepted that an offence against parking regulations (of which he was convicted) does not necessarily amount to the wilful obstruction required by section 54. It was essential to the decision, however, that the court should hold that G. was, on the facts, guilty of an offence under section 54; and they did so hold, apparently taking judicial notice of traffic conditions in London: "For anyone to leave his motor-car in Jermyn Street at two o'clock in the afternoon in order that he may go in and have lunch in a nearby restaurant speaks for itself. It can, and can only, be a wilful obstruction of the highway."

It was laid down by the House of Lords in *Christie* v. *Leachinsky* [1947] A.C. 573 that "If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized" (*per* Viscount Simon). There are exceptions to this rule where the man is caught red-handed so that explanation is superfluous or where, by resistance, he makes explanation impossible. The present case illustrates the further point, which was emphasised by Viscount Simonds and Lord du Parcq in *Christie* v. *Leachinsky*, that it is not necessary that the charge should contain the same accurate description of the offence as an indictment. The arrested man is entitled to know for what act he is being arrested, what are the facts which are alleged to constitute a crime on his part, and he has no ground of complaint if the crime which those facts are said to constitute is mis-described. ". . . an arrest does not become wrongful merely because the constable arrests a man for one felony, say, murder, and he is subsequently charged with another felony, say, manslaughter."

Thus there were two reasons in the present case why the omission to quote section 54 did not make the arrest unlawful: (i) it came within the "caught red-handed" exception for, "supposing the respondent had said nothing but had just arrested him, could it really be said that the appellant did not know all the facts constituting an alleged wilful obstruction of the thoroughfare without having that particular charge made against him at the time?"—*per* Lord Parker C.J.; (ii) the police officer did refer to the refusal to move the car—the obstruction of the highway—and it was immaterial that he "coupled with that the refusal to give his name and address or the allegation of obstructing him in the execution of his duty."

It is significant that the Attorney-General felt unable to argue that a constable is entitled to arrest somebody for obstructing him in the course of his duty, a misdemeanour under the Prevention of Crimes Amendment Act, 1885, where the circumstances do not show that a breach of the peace or an apprehended breach of the peace is involved. Counsel for the respondent had apparently submitted that there was such a power. The court found it unnecessary to come to any conclusion on the point but felt that there were "great difficulties" in the submission, and this view was reinforced by the Attorney-General's attitude. *Cf. Piddington* v. *Bates*, below, p. 262.

DIPLOMATIC IMMUNITY

Whether immunity extends to criminal proceedings—waiver

R. v. Madan

Court of Criminal Appeal: Lord Parker C.J., Winn and Nield JJ.: January 30, 1961: [1961] 2 W.L.R. 231.[2]

M. was convicted at quarter sessions of obtaining a season ticket by false pretences. M. was at all material times on the staff of the High Commissioner of India in London, and on the list kept by the Secretary of State under section 1 (4) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. The solicitor who appeared for M. before the committing magistrate purported to waive the diplomatic immunity. At the trial, M. gave evidence that he was on the staff of the High Commissioner but no steps were taken with regard to diplomatic immunity until after conviction when the probation officer told the court that the High Commissioner's office was under the impression that M. was entitled to immunity. At that stage the deputy-chairman said that M. must at some time, if he ever thought of it, have waived his immunity and that it was "a bit late to claim it now." Later, the Deputy High Commissioner of India wrote to the Commonwealth Relations Office stating that the High Commissioner was prepared to waive the immunity in the present case. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that it was clear that it was not for the person entitled to diplomatic immunity to claim it in the courts. Any proceedings brought against such a person were without jurisdiction and null and void unless and until there was a valid waiver. The waiver must be made by or on behalf of the representative of the country concerned and not by the person entitled to the privilege. This was clear from section 1 (5) of the Act of 1952, and, quite apart from that section, the case of *R.* v. *A. B.*

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[2] For the appellant: *Christmas Humphreys, Q.C., J. A. Kirpal* (instructed by Messrs. Percy Short & Cuthbert). For the Crown: *Ian Kennedy* (instructed by the Solicitor, British Transport Commission). As *amici curiae*: *Sir R. Manningham-Buller, Q.C., Att.-Gen., J. R. Cumming-Bruce* (instructed by the Treasury Solicitor).

[1941] 1 K.B. 454, laid down that diplomatic immunity was the privilege of the state concerned, although the question whether the privilege could be claimed in a criminal case was there expressly left open. In the opinion of this court, when dealing with something *mala prohibita*, as in this case, there was no distinction to be drawn between civil proceedings and criminal charges. Accordingly, the proceedings in the present case were without jurisdiction. The letter from the Deputy High Commissioner did not purport to be retrospective and it was unnecessary to decide what the position would have been if it had purported so to be. The conviction would be quashed. [H. P.]

Commentary. In *R.* v. *A. B.* the court found it unnecessary to decide whether the immunity extended to criminal proceedings for, even if the immunity existed, it had been waived. The older English authorities laid it down that even the ambassador himself could not plead his exterritoriality on a charge of murder or other felonies; but Blackstone (Book I, 254) wrote that "however these principles might formerly obtain, the general practice of this country, as well as of the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime."

While accepting that there is no English authority directly in point, Oppenheim, *International Law* (8th ed. by H. Lauterpacht, 1955, 790) asserts ". . . the doctrine and practice of International Law agree nowadays that the receiving States have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys. For a diplomatic envoy must in no respect be considered to be under the jurisdiction of the receiving State." The court in the present case has proceeded with a considerable degree of caution by confining its decision to *mala prohibita.*

EVIDENCE

Incriminating evidence of a co-prisoner—whether warning as to the need for corroboration should be given

R. v. Heaps

Court of Criminal Appeal: Lord Parker C.J., Winn and Widgery JJ.: January 31, 1961.[3]

H. was convicted at a Crown Court of receiving furs. The furs had been found in the possession of one C., who was indicted with H. At the trial C. gave evidence, on his own behalf, that he had obtained the furs from H., who had said that they were smuggled. H., in evidence, denied that he had ever had possession of the furs or that he gave them to C. The jury were given no warning in regard to the way in which they should approach C.'s evidence. On appeal to the Court of Criminal Appeal:

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[3] For the appellant: *J. M. Dovener* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *W. Morgan* (instructed by the Prosecuting Solicitor, Crown Court, Liverpool).

Held, allowing the appeal, that on one view C. was an accomplice in that he was charged and treated as such by the prosecution; but in *R.* v. *Barnes and Richards* (1940) 27 Cr.App.R. 154, this court had laid down that, where one prisoner gave evidence on his own behalf incriminating a co-prisoner, the prisoner who gave the incriminating evidence was not placed in the position of an accomplice, nor did the rule of practice with regard to the corroboration of an accomplice (which applied to witnesses called for the prosecution) apply to such a case. That might be the strict position, but it was clear that as a rule of practice some warning ought to be given with regard to the evidence of a co-prisoner who had every motive to excuse himself and to implicate his co-prisoner. Indeed, in *R.* v. *Prater*, 44 Cr.App.R. 83; [1960] Crim.L.R. 189, this court had stated that such a warning was desirable. There was, in the present case, no warning that C.'s evidence should be looked upon with suspicion and that corroborative evidence (or, more correctly, confirmatory evidence) ought to be looked for. In the circumstances, and having regard to other defects in the summing-up, the proviso to section 4 (1) of the Criminal Appeal Act, 1907, would not be applied and, accordingly, the appeal would be allowed.

[H. P.]

Commentary. The requirement that an accomplice's evidence be corroborated is a rule of practice only. In the leading case on the subject, *Davies* v. *D. P. P.* [1954] A.C. 378, Lord Simon specifically stated that the House was not concerned with the case of a co-prisoner's evidence and there were authorities, in addition to *Barnes and Richards,* which suggested that there was no requirement of corroboration in such cases as the present.

R. v. *Prater* and the present case are a welcome extension of the rule to co-prisoners, though it is not yet clear that it will be applied with the same strictness as in the case of other accomplices. "Confirmatory" evidence appears to be wider than corroborative evidence; and would presumably include evidence which tends to show that the prosecution witnesses are speaking the truth even if it does not implicate the accused in a material particular. In *Prater's* case it was said only that it was "desirable" that a warning should be given, whereas the *Davies* rule is that the warning must be given even if, in fact, there be ample corroboration, and failure to warn results in a conviction being quashed unless the court can apply the proviso to section 4 (1) of the Criminal Appeal Act. It may be that in time, the rule relating to the evidence of co-prisoners will similarly harden into a rule of law.

HOUSEBREAKING IMPLEMENTS

Passenger in car containing housebreaking implements—possession of gloves—evidence of lawful excuse—burden of proof

R. v. Harris

Court of Criminal Appeal: Lord Parker C.J., Salmon and Winn JJ.: January 24, 1961.[4]

H. was convicted at a Crown Court of possessing housebreaking implements by night. The facts were that H. was found by night with two other men in a motor-car. In the motor-car were a torch, a screwdriver, a sheath knife and three pairs of gloves. H. was sitting on the back seat of the car with a pair of gloves beside him; he admitted that the gloves were his own property, but denied knowledge of any of the other articles. The jury were directed that H. and one of the other men were "charged that . . . they were found having in their possession without lawful excuse implements of housebreaking. . . . Providing you think that . . . they were in possession of the implements and . . . it was a guilty possession in that they were intended to be used . . . in the course of housebreaking. A pair of gloves has the best of all possible lawful reasons for use. It is also very invaluable for housebreaking, and probably most housebreakers now do not go on their unlawful expeditions without being equipped with a pair of gloves." On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that this was a case in which *R.* v. *Lester and Byast*, 39 Cr.App.R. 157; [1955] Crim.L.R. 648, applied in the appellant's favour, so that the mere fact that the appellant was a passenger in a car containing housebreaking implements was not sufficient to constitute possession on his part. This applied to all the articles found in the car other than the appellant's gloves, and there was insufficient differentiation made in the summing-up between the possession of the driver of the car and the appellant's possession. Further, there was little, if any, indication given to the jury that the appellant's case was to be considered separately from that of the driver. The jury had not been told with sufficient clarity that, when considering whether the pair of gloves found in the possession of H. was a housebreaking implement, they should put out of their minds altogether the presence in the car of other articles which were manifestly housebreaking implements. It would then have been necessary to direct the jury to consider the explanation put forward by H. for the possession of an article which was of a neutral or even prima facie innocent character; and, of course, that the burden of proof resting on him would only have been the burden of establishing the balance of probabilities. In the circumstances the jury had not been adequately directed on the real issue which arose against the appellant and, accordingly, the appeal would be allowed. [H. P.]

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[4] For the appellant: *J. A. Gore* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *S. R. Baker* (instructed by the Town Clerk, Manchester).

Commentary. Where several persons are found together by night and it is proved that they were all participating in a common housebreaking expedition, all may be found guilty of possessing housebreaking implements by night, even where all the implements are carried on the person of one of them: "The possession of one is the possession of all," *per* Kelly C.B. in *R.* v. *Thompson* (1869) 11 Cox 362.

In *R.* v. *Lester and Byast* there was no evidence of a joint housebreaking expedition. It is clear that the presence of the housebreaking implements in the car is quite insufficient to fix the *passenger* with possession of them. It might well be otherwise with respect to the owner of the car. Housebreaking implements were found in the boot of Byast's car but the court did not rely on this point as he also had such implements on his person: and, "it is the practice of the court to refrain from expressing a final opinion on any question of law which is not necessary for the final determination of the case." It was, however, clear enough that the court's view, *obiter*, was that Byast was in possession of the articles in the boot. This view is supported by decisions on the law of larceny: see, *e.g.*, *R.* v. *Reed* (1854) 6 Cox 284; *Williams* v. *Phillips* (1957) 41 Cr.App.R. 5; [1957] Crim.L.R. 186.

In the present case the car, apparently, did not belong to H. and was not in his possession; nor was there any evidence of a common housebreaking expedition.

The dictum that there is a burden of proof on a balance of probabilities on a prisoner who asserts that he has a lawful excuse for the possession of housebreaking implements is interesting. In *R.* v. *Ward* [1915] 3 K.B. 696 it was held by the Court of Criminal Appeal that, once the prisoner has introduced prima facie evidence of a lawful excuse, the onus is shifted back to the prosecution to prove to the satisfaction of the jury that the prisoner was not in possession of the tools for an innocent purpose but for the purpose of housebreaking. In effect, this means that there is no burden of *proof* at all on the prisoner, for, if he can only raise a reasonable doubt in the jury's minds, he is entitled to be acquitted.

Ward is out of step with the general approach of the courts to statutes which prescribe that the onus of proving some matter shall be on the accused. The authority usually followed is *R.* v. *Carr Briant* [1943] K.B. 607, which holds that the effect is to impose a burden of proof on a balance of probabilities on the accused. *Ward*, however, appears to be binding on the Court of Criminal Appeal and the present dictum was presumably *per incuriam*.

For a full discussion of *Ward* and *Carr Briant* and their implications, see Glanville Williams, *The Criminal Law*, § 229.

MAGISTRATES COURTS

Dogs Act, 1871, s. 2—proceedings initiated by information—jurisdiction

R. v. Nottingham JJ., ex p. Brown

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ.: [1960] 3 All E.R. 625.[5]

An information was laid charging B. with being the owner of a dangerous dog which was not kept under proper control, contrary to section 2 of the Dogs Act, 1871. B. pleaded guilty. The justices adjudged that the dog was dangerous, that it was not kept under proper control, and that B. was the owner of the dog, and they ordered B. to keep the dog under proper control.

Section 2 of the Dogs Act, 1871, provides: " Any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous, and not kept under proper control, and if it appears to the court having cognisance of such complaint that such dog is dangerous, the court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed, and any person failing to comply with such order shall be liable to a penalty . . ."

Held, quashing the conviction, that since the proceedings had been wrongly initiated—by information instead of by complaint—they were a nullity from the beginning.

Per Lord Parker C.J.: " It seems to me plain on the wording of [section 2] that two stages are envisaged. In the first stage the court of summary jurisdiction on a complaint being made may make a certain order in a summary way. The second stage is this, that if the person concerned fails to comply with that order, he shall be liable to a penalty. On the wording of that section therefore the first step is really in the nature of a civil or administrative proceeding. . . . Certainly there is no offence involved at any stage until there is failure to comply with an order which is made, when a penalty may be inflicted." [D. C.]

Commentary. Section 42 of the Magistrates' Courts Act, 1952, provides that in any enactment conferring power on a magistrates' court to deal with any offence on the complaint of any person, for references to a complaint there shall be substituted references to an information. This provision did not cure the defect in the present case, because it is confined to *offences* and in the present case there was no offence. Moreover, section 100 (1), which precludes objections to an information or complaint on the grounds of deficiency in substance or in form, does not go so far as to allow an information to be *substituted* for a complaint or vice versa.

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[5] For the applicant: *J. P. Comyn* (instructed by Hancock & Willis for German & Soar, Nottingham). The respondent justices did not appear and were not represented.

The court appeared to be of the opinion that, if false evidence had been given on oath in the magistrates' court, perjury could not have been committed. In *R.* v. *Hughes* (1879) 4 Q.B.D. 614 a constable was convicted of perjury committed in the course of proceedings which he had initiated by procuring the illegal issue of a warrant, and the Court for Crown Cases Reserved held the conviction right. The magistrates in that case, however, had jurisdiction to try the charge which was made before them, if duly made, whereas the magistrates never had jurisdiction over the charge which was made before them in the present case.

Dogs Act, 1871, s. 2—complaint preferred by police officer

Smith v. Baker

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ.: [1961] 1 W.L.R. 38.[6]

A police officer preferred a complaint under section 2 of the Dogs Act, 1871. The justices ordered the dog to be destroyed. The owner of the dog appealed, contending that a complaint under that section, not being a criminal cause or matter, was not, by reason of sections 45 (2) and 46 (3) of the Magistrates' Courts Act, 1952, and rule 4 (2) of the Magistrates' Courts Rules, 1952, properly laid by the police officer, but should have been laid by the person aggrieved.

Section 2 of the Dogs Act, 1871, provides: " Any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous, and not kept under proper control, and if it appears to the court having cognisance of such complaint that such dog is dangerous, the court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed . . ."

Held, dismissing an appeal, that the word " complaint " in section 2 was unqualified as to who the complainant should be, and that a police officer was a proper person to lay a complaint under the section. [D. C.]

Commentary. Any member of the public may institute criminal proceedings, even though he has no interest whatever in the subject-matter of the charge—with certain statutory exceptions. Civil proceedings, however, can generally only be instituted by the person aggrieved, in whom is vested the cause of action.

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[6] For the appellant: *N. R. Fox-Andrews, Q.C.*, and *Henry Newman* (instructed by Geoffrey B. Gush & Co. for Wiliam Dawes & Co., Ashford, Kent). For the respondent: *Edward Gardner, Q.C.*, and *B. R. Clapham* (instructed by Sharpe, Pritchard & Co. for N. K. Cooper, Maidstone, Kent).

It has recently been held that proceedings under section 2 of the Dogs Act are of an administrative nature and that no offence is involved until there is a failure to comply with an order which is made, when a penalty may be inflicted: *R.* v. *Nottingham JJ., ex p. Brown*, above, p. 258. The proceedings in that case, having been instituted by information, which is appropriate only to criminal proceedings, and not by complaint, were a nullity from the beginning and were quashed.

It was therefore argued in the present case that, as these were civil proceedings, they could not be brought by a police officer who had not been in any way aggrieved by the dog. It would seem that the grave inconvenience of such a result was a decisive factor in influencing the court to give a broad interpretation to the statute so as to enable it effectively to deal with the mischief at which it is aimed. *Cf.* the similar approach adopted by the court in *Smith v. Hughes* [1960] Crim. L.R. 709.

Merchandise Marks Act, 1887, s. 2 (2)—Merchandise Marks Act, 1926, s. 6—third party procedure

R. v. Epsom JJ., ex p. Dawnier Motors, Ltd.

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ.: [1960] 3 W.L.R. 872.[7]

An information was laid against the applicants under section 2 (2) of the Merchandise Marks Act, 1887, charging them with selling goods to which a false trade description had been applied. The applicants preferred informations under section 6 of the Merchandise Marks Act, 1926, against two of their employees as the actual offenders. The justices found that the applicants were guilty of the offence charged, but that the informations preferred against the employees were not made out. The justices fined the applicants £50.

The applicants appealed to quarter sessions, their notice of appeal stating the general grounds of appeal were that " the penalty was too severe." No notices of appeal were served on either of the employees. Before quarter sessions the applicants sought to establish that they were entitled to exemption from penalty under section 6 of the Act. Quarter sessions considered that there was no jurisdiction to hear an appeal against the imposition of a penalty, but reduced the fine to £25.

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[7] For the applicants: *Eric Crowther* and *John Clarke* (instructed by Sharpe, Pritchard & Co., for A. R. Drummond & Co., Epsom). For the prosecutor: *Robin Simpson* (instructed by Crofts & Ingram and Wyatt & Co., for W. W. Ruff, Kingston-upon-Thames).

The applicants applied to the Divisional Court for certiorari to quash the conviction on the ground that the justices had come to the conclusion on the information before giving the applicants an opportunity to state their case, and for an order of mandamus requiring quarter sessions to hear their appeal against the finding of the justices that the applicants had failed to show themselves entitled to exemption under section 6 of the Act.

Held, (1) refusing the application for certiorari, that the procedure to be adopted at the hearing of any charge such as that under section 2 (2) of the Merchandise Marks Act, 1887, must enable a defendant to raise matters of defence, and that only after that had been done, and the defendant found guilty, should the justices go on to consider whether the defendant can obtain exemption from the penalty; but that on the evidence, the applicants had failed to show that that procedure had not been adopted; (2) that although an appeal to quarter sessions would lie from the dismissal by justices of a claim to exemption from penalty, under section 6 of the Act of 1926, an employee against whom an information had been preferred as the actual offender was an " other party " within section 84 (1) of the Magistrates' Courts Act, 1952, to whom notice of appeal must be given, and that since no notice of appeal had been given to the employees, and since the notice of appeal related to severity of sentence, the application must be refused. [D. C.]

Commentary. The third party procedure provided by some statutes goes to matters of defence and the accused who satisfies the statutory conditions is entitled to be acquitted. See, *e.g.*, the Food and Drugs Act, 1955, s. 13 (1), and the Factories Act, 1937, s. 137 (1). In other cases, such as the present, the successful raising of the statutory defence leaves the accused liable to conviction but exempts him from a penalty. Counsel for the respondent conceded that an appeal would lie in the former type of case from the decision of the magistrates on the third party point, but argued that the position was different where the third party procedure went only to penalty. The court rejected this argument because (1) the third party proceedings are not separate proceedings and (2) acquittal or exemption from penalty, as the case may be, is not conditional on the conviction of the third party, but only on proof that the accused used due diligence, and that the third party committed the offence without his consent, etc. When these conditions are satisfied, two results may follow: (a) the third party will be convicted and (b) the accused will be exempt from any penalty. Even if, as was argued, it is not open to an appeals committee to bring about (a) (because the third party has been acquitted) it does not follow that they may not bring about (b).

MERCHANDISE MARKS

Merchandise Marks Act, 1887, s. 2 (2)—Merchandise Marks Act, 1926, s. 6—third party procedure

See R. *v.* EPSOM JJ., *ex p.* DAWNIER MOTORS, LTD., above, p. 260.

OBSTRUCTING THE POLICE

Prevention of Crimes Amendment Act, 1885, s. 2—picketing by several persons—possibility of breach of the peace

Piddington v. Bates

Robson v. Ribton-Turner

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ.: [1961] 1 W.L.R. 163.[8]

In the course of a printers' strike, the prosecutor, a Chief Inspector of the Metropolitan Police, sent a police constable to a printers' works. The full complement of staff at the works was twenty-four, and at the material time, about eight of them were working there. After the arrival of the constable, two vehicles arrived containing about eighteen men, most of whom were wearing picket badges. Two pickets stood outside the front door of the premises while some patrolled the street there. Another constable told the defendant, who was a member of a registered trade union engaged in the strike and desirous of taking part in the picketing, that two pickets were enough for the front entrance. The prosecutor then went to the premises and found two pickets at the front entrance and four at the back. The prosecutor spoke to the pickets at the back entrance, and, as a result, two of them moved away. There were ten or twelve pickets in the road running past the back entrance when the defendant approached the prosecutor there, and was informed by him that, in the prosecutor's view, two pickets were enough at the back entrance. The defendant said that he was going to the back entrance, and that, if the prosecutor wished to prevent him, he had better arrest him. The defendant then pushed gently past the prosecutor, who arrested him.

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[8] For the defendants: *F. H. Lawton, Q.C.*, and *William Howard* (instructed by Shaen, Roscoe & Co.). For the prosecutor: *J. T. Molony, Q.C.*, and *L. Greenwood* (instructed by Solicitor, Metropolitan Police).

The defendant was charged with obstructing the prosecutor, a constable in the execution of his duty, contrary to section 2 of the Prevention of Crimes Amendment Act, 1885.

The magistrate found that there had been no obstruction of the highway, nor any disorder, nor any violence offered or threatened by any person present. He also found that the prosecutor had arrived at the view that picketing by more than two persons at each entrance of the premises might lead to an intimidation and a breach of the peace. The magistrate was of the opinion that the prosecutor was justified in anticipating the possibility of a breach of the peace, unless steps were taken to prevent it; that it was the prosecutor's duty to decide what those steps should be; that he was, accordingly acting in the course of his duty in seeking to prevent the defendant from joining the two pickets at the back entrance of the premises; and that the defendant, by his conduct, had obstructed the prosecutor.

Held, dismissing an appeal against conviction, " First, the mere statement by a constable that he did anticipate that there might be a breach of the peace is not enough: there must exist proved facts from which he could reasonably anticipate such a breach; and secondly, that it is not enough that his contemplation is that there is a remote possibility: there must be a real possibility of a breach of the peace; and that it accordingly . . . becomes a question of whether . . . it can be said that there were reasonable grounds on which a constable charged with this duty reasonably anticipated that a breach of the peace might occur." [D. C.]

Commentary. Under the Trade Disputes Act, 1906, s. 2, it is lawful for " one or more persons " to picket " for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." It was held by the magistrate that this provision did not make it unlawful for a police officer to limit the number of pickets, if such limitation was necessary for maintaining the peace, and therefore the fact that he did so did not alone and of itself divest a police officer of the status of " acting in the execution of his duty."

Lord Parker C.J. said: " It may be, and I think this is the real criticism, that it can be said: Well, to say that only two pickets should be allowed is purely arbitrary; why two? Why not three? Where do you draw the line? I think that a police officer charged with the duty of preserving the Queen's peace must be left to take such steps as on the evidence before him he thinks are proper."

OFFENSIVE WEAPONS

Prevention of Crime Act, 1953—possession of cut-throat razor—onus of proof as to intent

R. v. Petrie

Court of Criminal Appeal: Lord Parker C.J., Salmon and Winn JJ.: [1961] 1 W.L.R. 368.[9]

P. was convicted at quarter sessions of possessing, without lawful authority or reasonable excuse, an offensive weapon in a public place. The weapon in question was a cut-throat razor. The jury were directed that " . . . if you come to the conclusion on what you have heard here that this accused man was in possession of that razor and, of course, the Crown have to satisfy you about that, then the circumstances in which there was possession . . . are such that the onus shifts to him to show that his possession was legitimate, lawful and reasonable; it is for him to satisfy you that that is probably the case." Later, the jury were directed: " No doubt you will be satisfied that a razor is an offensive weapon." On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that under the Prevention of Crime Act, 1953, two classes of offensive weapons were envisaged. In the first class were weapons offensive *per se* (*i.e.*, " made or adapted for use for causing injury to the person "), and in the second class were weapons, not of themselves offensive, which could be used as such. In the first class of case, the onus shifted to the defence to prove, on the balance of probabilities, that there was lawful authority or reasonable excuse for carrying the weapon. In the second class of case, the onus was on the prosecution, and remained on the prosecution throughout, to show that it was carried by the defendant with intent to use it to cause injury. A razor was not a weapon offensive *per se* because it was not " made or adapted for use for causing injury to the person " and, therefore, it was quite wrong to direct the jury as a matter of law that P. was in possession of an offensive weapon and that the onus was on him to prove lawful authority or reasonable excuse. There was, in the present case, abundant evidence that P. was carrying this razor with the intent necessary to make it an offensive weapon within the meaning of the Act but, in all the circumstances of the case, this court felt that it would be unsafe to allow the conviction to stand. [H. P.]

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[9] For the appellant: *S. Stout-Kerr* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *H. J. Leonard* (instructed by the Solicitor, Metropolitan Police).

Commentary. The Prevention of Crime Act, 1953, is fully discussed by Mr. Ian Brownlie in [1961] Crim.L.R. 19. See especially the discussion of the meaning of "offensive weapon" at pp. 28–31.

POACHING

Poaching Prevention Act, 1862, s. 2—unlawfully killing or taking game—whether evidence of firing gun essential

Gray and Another v. Hawthorn

High Court of Justiciary: Lord Justice-Clerk (Thomson), Lords Mackintosh and Strachan: 1960 S.L.T. 11.[10]

G. and another were each convicted of using guns for unlawfully killing or taking game although there was no evidence that either gun had been fired or that the accused had possession of any game.

Held, on appeal by stated case against conviction, that a gun is not used only when fired and there was ample evidence to show that the accused were on the ground with the object of pursuing whatever target presented itself; and conviction affirmed.

Commentary. This case turned on the construction of the word "used" in section 2 of the 1862 Act, and the court took the common sense view, although mere police suspicions would not have amounted to proof: *Jamieson* v. *Barty* (1893) 1 Adam 91; *Taylor on Game Laws*, p. 29; and mere possession of a poaching instrument would equally be insufficient: *P. F.* v. *Ferguson* (1885) 1 S.L.R. 378. Evidence of actual pursuit is not essential either: *Mackenzie* v. *Lockhart* (1890) 18 R.(J.) 1.

In the English case of *Jenkin* v. *King* (1872) L.R. 7 Q.B. 478 evidence of use with the intention of unlawfully taking game was sufficient for conviction.

[Report and commentary by ALISTAIR R. BROWNLIE, S.S.C.]

POISONS

Pharmacy and Poisons Act, 1933, ss. 18, 19 (5) and 24—sale of medicine by employee without the supervision of a registered pharmacist

R. v. Staincross Justices, ex p. Teasdale

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ.: [1960] 3 W.L.R. 827.[11]

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[10] For the appellants: *King Murray* (instructed by Courtney & Co., Solicitors, Edinburgh). For the respondent: *Solicitor General* (*Anderson, Q.C.*), *Law, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

[11] For T.: *Rodney Bax* (instructed by Lamartine, Yates & Lacey). For the respondent: *R. A. R. Stroyan* (instructed by R. C. Linney, Wakefield).

T., a pharmaceutical chemist, pleaded guilty to an information which alleged that he, being an authorised seller of poisons, did unlawfully dispense a certain medicine otherwise than under the direct personal supervision of a registered pharmacist, contrary to sections 19 (5) and 24 of the Pharmacy and Poisons Act, 1933.

T. was, in fact, an authorised seller of poisons, but in his absence, an employee for whose actions he was responsible, contrary to his instructions, had sold the medicine, without the supervision of a registered pharmacist, thereby failing to comply with the provisions of section 19 (5) of the Act.

Section 18 of the Act provides: " Subject to the provisions of this Part of the Act, it shall not be lawful—(*a*) for a person to sell any poison included in Part I of the Poisons List, unless—(i) he is an authorised seller of poisons; and (ii) the sale is effected on premises duly registered under Part I of this Act; and (iii) the sale is effected by, or under the supervision of, a registered pharmacist. . . ."

Section 19 of the Act provides: " (1) Nothing in the last foregoing section shall apply . . . (*b*) to a medicine which is dispensed by an authorised seller of poisons on premises duly registered under Part I of this Act; or (*c*) to a poison forming part of the ingredients of a medicine which is supplied by an authorised seller of poisons on premises duly registered under Part I of this Act, if the requirements contained in the following provisions of this section are satisfied in relation thereto. . . . (5) In the case of a medicine which is supplied or dispensed by a person who is an authorised seller of poisons, the supplying or dispensing of the medicine must be effected by or under the direct and personal supervision of a registered pharmacist."

Section 24 of the Act provides: " (1) A person who acts in contravention of or fails to comply with any of the provisions of Part II of this Act . . . shall, on summary conviction, be liable in respect of each offence to a fine. . . . (2) In the case of proceedings against a person under this section for or in connection with the sale, exposure for sale or supply of a poison effected by an employee—(*a*) it shall not be a defence that the employee acted without the authority of the employer."

Held, quashing the conviction, that " medicine " in section 19 of the Act meant medicine which contained poison, and that section provided exemption from the substantive provisions of section 18; that the failure to comply with " any of the provisions of Part II of this Act," contemplated by section 24 (1), was a failure to comply with some substantive provision, and not with provisions affording an exemption and that, therefore, T. was wrongly charged with the offence. [D. C.]

Commentary. Section 19 creates no offence but is merely an exemption clause. It follows that a failure to satisfy the conditions of section 19 can hardly, in itself, amount to an offence under section 24.

SENTENCE

Probation order with order to pay compensation—subsequent sentence of imprisonment for breach of probation—effect on compensation order—Criminal Justice Act, 1948, ss. 6, 8, 11 (2)

R. v. Evans

Court of Criminal Appeal: Lord Parker C.J., Streatfeild, Glyn-Jones, Ashworth and Elwes JJ.: [1961] 2 W.L.R. 213.[12]

E. was placed on probation for three years in June 1959 in respect of offences of obtaining money by false pretences. At the same time an order for compensation was made under section 11 (2) of the Criminal Justice Act, 1948 (which provides that a court, on making a probation order, may order the offender to pay such compensation for loss as the court thinks reasonable). During the currency of the probation period E. failed to inform the probation officer of his change of address and, having been brought before quarter sessions for breach of probation, was sentenced to two years' imprisonment. No reference was made by quarter sessions to the order for compensation. On appeal to the Court of Criminal Appeal:

Held, that the question for this court was, if a probationer in whose case an order for compensation had been made was subsequently dealt with and punished (whether by fine, detention, order for borstal training or imprisonment), did the infliction of that punishment put an end to the order for compensation? Under section 6 of the Act of 1948 the court could deal with him in any manner in which it could have dealt with him if he had first been convicted of the offence. The provisions of section 8 of the Act were in similar terms. This court did not think that by implication and in the absence of express words it could read into those sections a provision that the orders of the first court were automatically nullified when the second court dealt with the offender.

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[12] For the appellant: *E. D. R. Stone* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. H. Buzzard* (instructed by the Solicitor, Metropolitan Police).

This opinion was fortified by the provisions of section 5 (4) of the Act (which provided that, where a probationer was sentenced for the original offence, the probation order should cease to have effect) because that section negatived the suggestion that the second court had to deal with the probationer on the footing that all the orders of the original court were of no effect. Accordingly, in the judgment of the court, E. was still liable to pay compensation under the original order, notwithstanding that he had since been sent to prison following his breach of the original probation order.

[H. P.]

Commentary. A court dealing with a probationer under section 6 (3) (*a*) of the Criminal Justice Act, 1948, is entitled to take into account the conduct of the probationer since the probation order was made, as well as other events which have occurred since that time, *e.g.*, his becoming old enough to qualify for corrective training or preventive detention or too old for Borstal training. The unreported case of *R.* v. *McCarthy* (October 25, 1960, in the Court of Criminal Appeal), which was criticised by Mr. R. W. J. Norton in [1960] Crim.L.R. 105, is overruled by the court of five judges assembled in the present case to deal with the situation. *McCarthy*, as Mr. Norton pointed out, was based on the wrong section of the Criminal Justice Act, 1948.

It was pointed out that the result of the present case is that two courts have brought about by their separate orders a result which neither has power to order at one time, *i.e.*, the accused both suffers punishment and has to pay compensation. The order for compensation vests in the victims of the crime in whose favour it is made, a right to enforce the order for their own benefit and the court was unwilling to attribute to Parliament an intention to take away that right in the absence of clear words to that effect.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Housebreaking

In R. *v.* LAKE the court (Lord Parker C.J., Winn and Widgery JJ.: February 5, 1961) held that a second sentence of preventive detention should, when the offender was still serving the first sentence, date from conviction. L., who was a woman of forty-six years of age, had been sentenced for eighty-one offences of dishonesty since 1930. She had been sentenced to eight years' preventive detention in 1955 and, whilst serving that sentence, absconded and committed the present offences of housebreaking and larceny. On being brought before quarter sessions for those offences she was sentenced to ten years' preventive detention consecutive to the sentence then being served. The court stated that there was nothing wrong in principle with making a term of preventive detention consecutive to another such term, but care must be taken not to impose such a sentence where it would involve a forfeiture of a period spent on licence. In this case there would be a loss of sixteen months on licence. The better practice would be to make the term date from the date of conviction so as to absorb the previous term of preventive detention.

Manslaughter

In R. *v.* ELLISON the court (Lord Parker C.J., Streatfeild and Elwes JJ.: November 28, 1960) reduced a sentence of three years' imprisonment to one which would enable the appellant to be released immediately. E. had been charged with the murder of his wife but, having raised the defence of diminished responsibility, was convicted of manslaughter. E., who was a man of seventy-two years of age, was of previous good character. The facts were that E. had lived happily with his wife for fifty years. In 1956 she had become ill from a heart complaint; her condition deteriorated and by March 1960 he was nursing her single-handed and doing all the shopping and other domestic duties. As a result, E. became exhausted, both physically and mentally. The medical evidence was that E. was suffering from such an abnormality of mind as to impair his mental responsibility due to emotional stress and lack of sleep. The court stated that E. had now been in custody for some eight-and-a-half months. It appeared that his condition now showed a marked improvement. His son and daughter-in-law were prepared and anxious to have E. to live with them. In the circumstances, this court had come to the conclusion that E. could now properly be released. It was not a case for a probation order. E. would have a good home to live in and would have all the necessary supervision from the son and daughter-in-law. This court would, therefore, set aside the sentence of imprisonment and would substitute such sentence as would enable him to be released today.

Wounding with intent

In R. *v.* ALLEN the court (Hilbery, Paull and Howard JJ.: February 13, 1961) reduced a sentence of three years' imprisonment to one of four months' imprisonment. A. had pleaded guilty to wounding with intent to cause grievous bodily harm. The circumstances were that A. lost his temper with a tramp who had been importuning him for money; he knocked the tramp down and twice kicked him. A., who was a man of twenty years of age, was a radio operator in the Royal Navy and of previous good character. The court stated that the kicking of the tramp when he was on the ground was utterly wicked and inexcusable. On the other hand A. was not trying to rob anyone, he was not one of a gang and he was not committing an assault merely for the sake of being brutal. A. had a career in the Royal Navy in front of him which would almost certainly be lost if the present sentence stood. Moreover, this court had seen a letter from the officers of his ship which indicated that A. had earned the reputation of being a really desirable young man to have in the Service. In the very exceptional circumstances of this case, the sentence of three years' imprisonment would be set aside and a sentence of four months' imprisonment substituted.

Acts and Orders *

Civil Aviation

This Order, made under section 2 (6) of the Civil Aviation (Licensing) Act, 1960 ([1960] Crim.L.R. 644), authorises the grant of air service licences to persons specified in the Order, being persons who provided air transport services before the coming into force of section 1 (2) of the Act. The Air Transport Licensing Board are obliged by section 2 (6) to grant the licences specified in the Order without application being made therefor. Operative January 30, 1961. CIVIL AVIATION (TRANSITIONAL LICENCES) ORDER, 1961 (S.I. No. 147) (4d.).

The Civil Aviation (Licensing) Regulations, 1960 (S.I. No. 2137), are amended by adding thereto provision for the making of representations to the Minister by the Government of the Isle of Man, or by the States of Jersey or Guernsey, as respects decisions of the Air Transport Licensing Board regarding air service licences. Certain minor corrections and amendments are also made. Operative January 30, 1961. CIVIL AVIATON (LICENSING) (AMENDMENT) REGULATIONS, 1961 (S.I. No. 145) (3d.).

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* Prepared by F. Maurice Drake, Barrister-at-Law.

Criminal Procedure

The Evidence by Certificate Rules, 1948 (S.I. 1948, No. 2664), are revoked and re-enacted to take into account the passing of the Road Traffic Act, 1960. It is also provided that service may be effected by the new " recorded delivery " service in the case of certificates and statutory declarations proposed to be used in evidence in criminal proceedings and of notices connected therewith. Operative March 1, 1961. EVIDENCE BY CERTIFICATE RULES, 1961 (S.I. No. 248) (3d.).

Where, in the rules of procedure in magistrates' courts, reference is made to registered post, the new " recorded delivery " service will be included in the reference, and hence may be used in lieu of registered post. Operative February 13, 1961. MAGISTRATES' COURTS RULES, 1961 (S.I. No. 169) (2d.).

Exchange Control

The list of banks and other persons authorised to deal in gold and foreign currencies and of authorised depositaries for the purpose of the deposit of securities under the provisions of the Exchange Control Act, 1947, is amended. Operative January 24, 1961. EXCHANGE CONTROL (AUTHORISED DEALERS AND DEPOSITARIES) (AMENDMENT) ORDER, 1961 (S.I. No. 112) (2d.).

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 85 (St. Marylebone) (2d.); 86 (Staines) (2d.); 163 (Wandsworth) (3d.); 167 (Poplar) (3d.).

The following Order has been made detailing parking places: S.I. No. 156 (St. Marylebone) (3d.).

The following Orders have been made prohibiting waiting: S.I. Nos. 200 (Eynsford) (3d.); 201 (Woking) (4d.).

Magistrates' Courts

See under **Criminal Procedure,** above.

Merchant Shipping

Sections 1 and 2 of the Oil in Navigable Waters Act, 1955, prohibit the discharge of certain oils or oily mixtures in certain sea areas specified in the Schedules to the Act, included among which is a certain area of the Atlantic coast of Canada. This Order amends the Schedules to the Act by enlarging the specified sea area off the Canadian coast, so that it now extends up to 100 miles from the coast. Operative February 25, 1961. OIL IN NAVIGABLE WATERS (PROHIBITED SEA AREAS) (EXTENSION OF CANADIAN ZONE) ORDER, 1961 (S.I. No. 78) (2d.).

For penalties for contraventions, see section 11 of the Oil in Navigable Waters Act, 1955.

Road Traffic

Seceion 66 of the Road Traffic Act, 1960, includes a provision making it an offence to use on a road at any time a motor-vehicle first registered more than ten years ago, unless the vehicle has been tested and has passed that test within the past twelve months. The section further provides that this requirement of passing the test does not apply to certain public service vehicles or to vehicles of such classes or descriptions as may be prescribed by the Minister of Transport. The Minister is empowered by regulations to exempt from the test requirement motor-vehicles used for such purposes and in such areas as he may prescribe.

The Minister has now prescribed certain classes of vehicles which are exempt from the testing requirements (Regulation 3) and also vehicles when used for certain purposes (specified in Regulation 4) or when used in certain islands and other areas (including the Isle of Wight) defined in Regulation 5. Operative February 15, 1961. MOTOR VEHICLES (TESTS) (EXEMPTION) REGULATIONS, 1961 (S.I. No. 209) (3d.).

Section 2 of the Road Traffic Act, 1956 (which requires the testing of vehicles more than ten years old), is brought into operation on various dates for vehicles of various ages, as follows: in respect of vehicles first registered before January 1, 1937, the section came into operation on February 15, 1961; in respect of vehicles first registered on or after January 1, 1937, but before January 1, 1946, the section came into operation on March 15, 1961; in respect of vehicles first registered on or after January 1, 1946, but before January 1, 1949, the section becomes operative on April 15, 1961; and in respect of vehicles first registered on or after January 1, 1949, the section becomes operative on May 15, 1961. ROAD TRAFFIC ACT, 1956 (COMMENCEMENT NO. 11) ORDER, 1961 (S.I. No. 148) (2d.).

For penalties for contraventions, see section 2 of the Road Traffic Act, 1956.

Scotland

The restrictions imposed by the Importation of Plants (Scotland) Order, 1955, in respect of certain raw vegetables from specified districts of Belgium, France, Italy and Holland, are modified for specified periods of 1961. Operative March 1, 1961. IMPORTATION OF RAW VEGETABLES (SCOTLAND) ORDER, 1961 (S.I. No. 205) (3d.).

The Public Health (Meat) Regulations (Scotland), 1932 and 1948, are revoked and replaced. Provision is made for ante-mortem and post-mortem inspection of animals intended for slaughter for human consumption, and as to animals slaughtered elsewhere than in a slaughterhouse during an emergency. Part VI enables local authorities to fix times within which private slaughterhouses may undertake the slaughtering of animals; it contains provisions about the qualifications of inspectors, and imposes penalties for offences against the regulations. Slaughterhouses in certain of the remoter counties and in two small burghs are exempted from the ante-mortem provisions of Part II of the Regulations. Operative March 1, 1961. FOOD (MEAT INSPECTION) (SCOTLAND) REGULATIONS, 1961 (S.I. No. 243) (9d.).

For penalties for contraventions, see Regulation 21 of these Regulations.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

79. *Game laws—police powers of search and seizure on land*

Section 1 (1) of the Game Laws (Amendment) Act, 1960, reads: "A police constable may arrest a person found on any land committing an offence under section one or section nine of the Night Poaching Act, 1828 (which sections relate to persons trespassing in pursuit of game by night)."

Subsection (2) of that section deals with offenders' identity requirements and, under certain conditions, powers of arrest.

Section 4 (1) of that Act reads: "Where a person is apprehended under section one of this Act . . . a police constable by or in whose presence he was apprehended may search him and may seize and detain any game . . . etc."

It is realised that, on land, a police constable had and still has powers when assisting a gamekeeper, etc.

I ask your advice regarding a case where a police constable, unaccompanied, stops and searches a poacher *on land* at night and takes possession of a gun, cartridges and pheasants. The offender is then allowed to go to his home (nearby) and reported for summons.

In such a case, where no arrest was made, have the police powers of search and seizure on land? On the highway, of course, police have powers of search and seizure under the Poaching Prevention Act, 1862. [D. W. B.]

ANSWER

In my opinion the answer to your question is no.

As you correctly state, the police have powers under the Poaching Prevention Act, 1862, to search persons suspected of poaching when those persons are on the highway. The provisions of the 1862 Act were considered by the legislature when framing the Game Laws (Amendment) Act, 1960, for section 3 of the 1960 Act does in fact amend the 1862 Act by extending and amending the class of materials which may be seized from a searched suspect on the highway.

But although the 1862 Act was dealt with in this way no amendment was made by which powers were given to search suspects found on land unless the suspect is arrested. Section 4 of the 1960 Act which introduces the powers of search and seizure of materials from persons found on land quite clearly and expressly limits such powers to persons " apprehended under section one of this Act, . . ." which section gives a power of search and seizure only after arrest.

For these reasons I think it clear that police powers of search and seizure *on land* may only be exercised after arrest of the suspect. [F. M. D.]

80. *Road traffic—offence of driving whilst disqualified tried with other road traffic offences—magistrates courts*

It is not an uncommon occurrence that when an offender is arrested by the police for " taking and driving away a motor-vehicle " contrary to section 217 of the Road Traffic Act, 1960, for a further offence to be disclosed of " driving whilst disqualified " contrary to section 110 of the same Act.

In view of the principle laid down in *R.* v. *Pomeroy* (1935) 25

Cr.App.R. 147, that a charge of "driving whilst disqualified" should not be tried along with another road traffic offence because of the possible prejudice to the defendants, would it not be the correct procedure for the police to charge the offender with the "driving whilst disqualified" offence separately from the other offence(s)? At the moment such procedure is not adopted in this city and I have known offenders convicted under such circumstances after pleading not guilty.

What in your opinion would be the result of an appeal against conviction under such circumstances? and do you consider that when a section 110 offence is disclosed the offender should be charged separately so that this offence could be the subject of a separate hearing? [L. W. P.]

ANSWER

R. v. *Pomeroy* was concerned with jury trials. I do not think that the same considerations would be held to apply to trials by magistrates, though I cannot find any decided case on the point. To have contemporaneous charges against the same defendant heard by different benches would be very inconvenient and could very well result in unnecessary hardship to the defendant. It is certainly common practice for the same magistrates to hear both charges in the circumstances mentioned by your correspondent. There are many other frequently encountered occasions when magistrates must, when adjudicating, put out of their minds matters which have emerged during the hearing although not admissible as evidence in the issue being tried. [A. E. J.]

Letters to the Editor

The Police as Prosecuting Officers

Sir,

I was interested to read the exchange of views between two of my colleagues (Mr. A. A. Muir and Mr. T. C. Williams) on the subject of police prosecutions in court. The following account of a recent experience in my own county might explain why this subject has been "shelved" every time it has been raised in the past:

A police officer who was the informant in three "straightforward" prosecutions for traffic offences was unable to attend court owing to sickness. The officer's Superintendent was able to give the defendants a few days' notice of his intention to apply for an adjournment of the cases. That was done, and a fresh date was fixed. Unfortunately, the officer who was sick did not make as speedy a recovery as had been anticipated, and the Superintendent found that he was unlikely to resume duty before the date which had been fixed for the adjourned hearings. Rather than cause further inconvenience to the defendants, and to avoid leaving the prosecutions hanging over them for a few more weeks, I authorised the Divisional Superintendent to engage a local solicitor, who already had an engagement to present two other police cases in court on the day in question.

The local solicitor presented all five cases. In two of the traffic offence cases " Guilty " pleas were tendered. The solicitor submitted details of his advocate's fee to the Bench in each of the traffic offence cases, but the Bench did not make any order for any defendant to pay an advocate's fee as part of the prosecution's costs. (Defendants and Benches have, of course, got used to this system of justice being administered " on the cheap " and it would have been a little unfair to these three defendants to add costs to the fines imposed upon them.)

In due course I received accounts from the solicitor for his services in each of the five cases he had prosecuted on that day. I received accounts for £15 15s. and £7 17s. 6d. for the two cases in which the solicitor was originally engaged, and three additional accounts of £7 17s. 6d. each for the three small traffic offence cases: £47 5s. 0d in all.

Both Mr. Muir and Mr. Williams have expressed the hope that something may be done about solicitors accepting simple police cases for " a modest fee." I hope so too; and until something is arranged perhaps everyone will remember that Chief Constables are only allowing their officers to appear as " Prosecuting Officers " to save public money. Few Chief Constables can spare officers to be sitting in courts (sometimes several officers in several courts) each day of the week.

Yours faithfully,

" ANOTHER CHIEF CONSTABLE."

Sir,

I have read with interest Mr. A. A. Muir's letter in the March issue and as a solicitor doing a considerable amount of advocacy in the magistrates' courts, both prosecuting for the police and defending, I must say that I agree entirely with Mr. Muir's views.

Any case that might involve anything more than the mere giving of evidence should be conducted by a solicitor. It is better that he should be a solicitor advocate in private practice which is the system in Durham at the moment because such solicitors tend to become very experienced advocates with a good all round knowledge of law and practice. Rightly or wrongly it is a fact that prosecuting departments of local authorities do not seem to attract those who shine in advocacy.

I also agree with Mr. Muir's suggestion of asking a solicitor who has one or two substantial cases on a particular day to conduct all the other " first court " cases for that day at what he calls a fairly modest fee. There need be no beating about the bush on this and there is no reason why specific figures should not be mentioned. A solicitor is not adequately paid on a contested careless driving prosecuion if the fee is less than £7 7s. if he has done his job properly, or on a contested prosecution for say fraud for less than £10 10s., but most solicitors would be prepared to take a case of this type, or perhaps two, together with a number of lesser cases at £1 11s. 6d. each for the lesser cases provided that no correspondence were involved at all. The papers could be handed to the solicitor not later than 3.0 p.m. on the day before the cases and he could mark the results on an appropriate form attached to the papers themselves, handing them into the Police Office on leaving the court.

By this method an Inspector would be released from court duty and the police would have the benefit of having the cases handled by a reasonably skilled advocate at the minimum of costs. Cases where nothing other than the presentation of evidence was required could be heard in the second court in " Metropolitan fashion."

Yours faithfully,

" DURHAM SOLICITOR."

Sir,

Your correspondents, the Chief Constables of Durham and Huntingdonshire, have raised with due moderation the question of the police acting as prosecuting officers. I would like to accept Mr. Muir's invitation to members of the legal profession to concern themselves with this problem and would only add that many of us have been so concerned for some while.

The legal aspect of the matter is, I would suggest, accurately set out at page 2383 of *Stone*, 92nd Edition, Volume 2, and may be summarised as follows:

1. The courts view with disfavour the practice of police officers acting as advocates (*Webb* v. *Catchlove* (1886) 50 J.P.Jo. 795; 3 T.L.R. 159).
2. The actual informant or complainant in summary cases is entitled to conduct the case himself irrespective of whether he be a private informant or complainant or a police officer (*Duncan* v. *Toms* (1887) 51 J.P. 631).
3. On indictment (and, presumably, indictable cases) there is no such power.

This apart, I am as vigorously opposed to police officers usurping the functions of solicitors and barristers as I would be were solicitors and barristers to usurp the functions of police officers. To read of an Inspector " gently and responsibly " (and, one might add, competently and dispassionately) " conducting the case before the court " brings one into affinity with Dr. Johnson in that one is not so much surprised that he is able to do it badly as that he is able to do it at all. The test of legal knowledge must involve more than " a comparison of qualifying examination papers " as between the police and the lawyer, the first essential to a true understanding of law is a thorough grounding in general legal principle which of necessity is denied the qualifying police officer.

Competency in a prosecuting advocate is not merely essential to discharge the duty to the public but, what is no less important, the duty to the defendant and to ensure a fair trial. Whilst there are lawyers whose knowledge of the rules of evidence leaves much to be desired it is at worst higher than that of a police officer. Nothing is more damaging to a defendant than to have inadmissible evidence led by police Inspectors before lay justices which, when the clerk has ruled it inadmissible, they are requested to dismiss from their minds (although everyone knows that it is unlikely that they will be able so to do). How often does an advocate appearing before lay justices allow inadmissible questions to pass without objection for fear that the Bench will consider he is taking unfair advantage of "our Inspector" with "technical" points and is altogether too tricky. This is injustice engendered.

Does Mr. Williams really believe that in a building locally known as the *Police Court* (despite its change in name); in relation to a matter which has been *investigated by the police*; where the *proceedings have been taken by the police* and the complaint, of necessity, laid by the Inspector personally (otherwise he has no power to present the case); in which a vital part of the prosecution *evidence will be given by the police*; where the case is *prosecuted in court by the police* and at the conclusion of which the *police will in many cases be asking for the costs* of the proceedings *to be paid to the police*, that a member of the public is unlikely to get the impression that the police are running the court? What, however, is of even greater importance than this is that whatever be the impression of the public in this connection, one is never left in very much doubt that the defendant thinks precisely that which Mr. Williams would tend to deny. Moreover, one frequently gets the impression, even as a lawyer, that a local Bench, knowing the prosecuting Inspector both from his appearances in and the less formal meetings outside, is inclined to lean towards upholding any course of action which he is minded to urge upon them. Finally in this connection, and this is not written in any spirit of disparagement, the experience, regimen and training of a police officer as a member of a Government body runs counter to that fearlessness, independence and ability to give dispassionate consideration which are fundamental in competent advocacy.

I find myself unhesitatingly in support of everything which Mr. Muir has said. I am not so much disturbed about the indignity of a qualified solicitor or barrister arguing points of law with an unqualified police officer (though I am by no means in favour of it) but what is important in this connection is that it places an unwarranted burden upon the lawyer. The function of an advocate is to assist the court. If an unqualified police officer has put a point of law either so badly that the court does not understand it or has based his argument upon false points, then it is incumbent upon the lawyer appearing in the case to correct the false impression or alternatively to argue the prosecution's case in order to endeavour then to refute it. This may be a necessary and understandable course of conduct as between lawyers. It is, however, sometimes difficult to explain to a client who has paid a fee to have his case presented to the court, why it was necessary for his lawyer to argue the opposing case. No wonder the defendant has difficulty in appreciating that justice is seen to be done.

It is true that the introduction of this necessary reform is usually frustrated by reference to the expense of employing qualified advocates in a large number of cases. On the other hand, if it is possible to operate a system with so much to commend it in Durham it ought not to be impossible in Huntingdonshire or elsewhere. More prosecuting lawyer advocates in the Metropolitan area would be welcome, and additionally to solicitor-advocates there are members of the Bar who are by no means overworked. The system in which unpaid lay justices try cases presented by untrained police advocates is no doubt justified in the minds of some as affording what is so often called "cheap justice." One of the definitions, however, of "cheap" in the *Oxford Dictionary* is "worthless, of little account" and there are some who may feel that justice of that description is dear at any price.

Yours truly,

DAVID NAPLEY,

President, London (Criminal Courts) Solicitors' Association.

Books and Periodicals

Book reviews:

Pioneers in Criminology. Edited by Hermann Mannheim. The Library of Criminology, No. 1. London: Stevens & Sons, Ltd. 1960. xi and 402 pp. (including index). 45s.

The respective chapters of this book are collected from contributions made to the *American Journal of Criminal Law, Criminology and Police Science*; this is always a method which creates its own problems. Nevertheless, the primary purpose of this publication is not made apparent to the reader. Dr. Hermann Mannheim makes a gallant effort to knit this series together with an introduction of some length. Then follows, chronologically, descriptions of the work—and sometimes a little of the life—of the respective pioneers.

The chapters are very variable in quality, for example, the one on Isaac Ray is excellent; but perhaps this is due to a partiality of this reviewer for the subject of that essay. However, no such feeling would have been experienced about John Havilland and his imitators (see p. 100 *et seq.*); nevertheless, the tangible symbol of the emergent Pennsylvania System of solitary confinement, which has acquired today a nightmarish quality, is surprisingly impressive. Again, the exposition of Durkheim's penological theory (p. 307), which comes so close to that expressed in relation to aggressivity by Meng and Paul Reiwald, is a most enlightening surprise.

At the other end of the scale are the contributions which read like *The Times* Obituary Notices, where the too frequent use of the eulogistic words employed by "conventional wisdom" render their deeper implications absurd, for example gift of friendship, salons and talented wives, "great" and "original" men, time alone will show . . . , etc. On the question of originality alone, it is surprising to find people of the eminence of the contributors still worrying about how much of a scholar's work is original and how much mere repetition of other men's efforts (p. 303). It is surely accepted today that it is given to few men to have more than one original idea in a lifetime—and they are lucky to have that one.

Ideally, this book would be used in small-sized seminars for discussion purposes. In England, we do not seem as yet to have facilities in the field of criminology for such luxuries unless the post-graduate course in criminology at Cambridge[1] provides them; but no doubt in the United States of America this will be its main function. Finally, in case the seminar consists of historically minded law graduates, let our legal veneration for the Bench not compel us to support Mr. Justice Barry, in his interesting chapter on Maconochie, in the statement that William IV died in 1839 (p. 68).

T. E. JAMES.

Readers' digest:

Betting and Gaming: Betting office licences—I: 105 *Solicitors' Journal* 168; II: 105 *Solicitors' Journal* 194.

Forensic: Examination of typewritten documents: 16 *International Criminal Police Review*, No. 144, p. 12.

Juveniles: The Report of the Committee on Children and Young Persons (concluded): 125 *Justice of the Peace* 73.

Law Reform: Victims of crime: 105 *Solicitors' Journal* 145.

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[1] See above, p. 211.

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1961

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THE
CRIMINAL LAW
REVIEW

May 1961

The Criminal Justice Bill

The Criminal Justice Bill has emerged from the Commons looking, after all, much the same as it began, despite the prolonged deliberations of the standing committee. An opposition amendment in committee to postpone the proposed reduction to fifteen of the minimum age of qualification for a sentence of Borstal training was repealed on report. The reduction was to have been delayed until remand centres are available to receive fifteen-year-olds committed to quarter sessions for Borstal sentence, because of the fear of these young offenders making contact with adults in prison. The Home Secretary has given an assurance that until remand centres are available—and it is now announced that the programme for these has been delayed—the children in question will be effectively segregated.

The completion of another reform waits upon the provision of sufficient detention centres. The Bill envisages the elimination of short and medium-length prison sentences in the case of young offenders. For the present it is proposed that sentences of between six months and three years shall not be given; and only long sentences will be possible when detention centres can accommodate all those requiring the short sharp shock. It is to be hoped that no effort will be spared in providing the requisite number of detention centres as soon as possible. The number of young offenders at present serving short sentences shows a considerable increase over that for a comparable period in 1960. When it is realised that many of these offenders are sleeping three in a cell, the urgency of the problem becomes apparent.

The Bill contains other important amendments to the courts' powers in dealing with young offenders, including the raising of maximum fines in an age of teen-age prosperity, and the reduction of the maximum term of Borstal training from three years to two.

New provisions are made for the supervision of persons released from detention centres and from approved schools and of certain discharged prisoners. The classes of the latter group who will be eligible for supervision orders will be much wider than under section 22 of the Criminal Justice Act, 1948; and the proposed new system of supervision will give real opportunities for after-care and for the amassing of a useful body of experience by the Central After-Care Association, which is expressly designated by the Bill as the supervising society.

Other detailed provisions of the Bill include clauses dealing with release and removal from approved schools, with transfer from one approved school to another or to Borstal and with the management of approved schools. In this part of the Bill effect is given to some of the recommendations of the report on the Carlton Approved School disturbances.

The Government successfully resisted moves to introduce corporal punishment for young males twice convicted of violent crimes and to raise the minimum age for hanging to twenty-one. Many will regard that aspect of the proceedings as a drawn battle.

Prosecuting Officer

The publication last year of our series of articles under this title and as a book has prompted interesting correspondence in recent issues of this journal from police officers, practising solicitors and a solicitor who is a clerk to justices and the letters on page 338 now close this correspondence.

We venture to suggest that the police ought not to undertake prosecutions. Such tasks should be performed by lawyers and the main duty of policemen is to police and not to act as lawyers, excellent criminal lawyers though many of them are. Local authorities should, in our view, face the financial responsibility of seeing that cases are handled in court by lawyers. They should no longer avoid this responsibility by allowing policemen to prosecute " on the cheap."

Until local authorities do face this problem we hope that the police will be encouraged to do the job to the best of their ability.

Misdirection on the burden of proof

It is an elementary as well as a fundamental rule of English criminal law that " the jury should be directed first, that the onus is always on the prosecution; secondly, that before they convict they must feel sure of the accused's guilt. If that is done, that will be enough ": *R.* v. *Hepworth and Fearnley* [1955] 2 Q.B. 600; [1955] Crim.L.R. 576, *per* Lord Goddard C.J.

In view both of the importance and the simplicity of this rule, it is astonishing to find that case after case comes before the Court of Criminal Appeal in which it is alleged that the trial judge has failed to comply with it. No less than four of the cases reported in this month's *Case and Comment* relate to failures to direct the jury properly with respect to the burden of proof. In two cases (*Woods*, below, p. 324, and *Jones*, below, p. 322) the court was able to hold that the use of an inaccurate expression (" pretty certain " in the one case and " reasonably sure " in the other) was cured by the effect of the summing up as a whole ; in the third case (*Slinger*, below, p. 324) the court felt able to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, in spite of an omission to tell the jury that the onus of proof was on the Crown ; while in the fourth case (*Milne*, below, p. 323) a similar omission required the quashing of the conviction.

Apart altogether from the waste of the time of the judges and others and the expense involved, such judicial lapses are particularly serious in English law because of the lack of any power in the Court of Criminal Appeal to order a new trial. There are approved and well-known formulae for describing the onus of proof which lies on the Crown and it is surely not too much to expect judges to know them and to adhere strictly to them. With great respect, it is hardly creditable to English justice that these lapses should occur and with such regularity. [J. C. Smith.]

Attacks on the police in court

The Police Federation recently presented a memorandum to the Royal Commission on the Police. One of the matters to which the Federation drew attention was the frequency with which defending counsel and solicitors make " false allegations against the police of brutality, perjury and corruption." Policemen apparently feel strongly about unjustified attacks on their integrity.

It may seem hard to say so, but are not these attacks one of the many inescapable occupational risks of the policeman's profession? The principle upon which a defence advocate is bound to act is that the story his client tells him, if it justifies a plea of not guilty, should be advanced in court with whatever force and in whatever detail the interests of the client demand. If the client says, " My so-called confession was beaten out of me," the advocate must accept that allegation as the basis of his operations. He may advise his client of the possible consequences of making such an allegation and may refuse for tactical reasons to attack the confession. But he cannot refuse his client's instructions merely because he does not believe them or does not enjoy attacking policemen.

The reason is trite. Some allegations against the police are conceivably true. Certainly there is no irrebuttable presumption that every such allegation is false. The defence advocate cannot usurp the court's function: to do so would be to deny his client proper representation. He must follow his brief. A police officer who might be inclined to feel wounded should understand the advocate's duty for what it is. He and the advocate should each appreciate the nature of the other's function in the administration of justice.

Review of the Judges' Rules

In a written answer in the House of Commons on March 16,[1] the Home Secretary said that he had received several representations from M.P.s and other sources about the present practice in the recording and use in evidence of statements made by accused persons when in police stations or in police custody. Representations had also been made to the Royal Commission on the Police. Mr. Butler said that the Lord Chief Justice had agreed that it was now appropriate for the judges to review the scope and operation of the Rules, and that the necessary arrangements were being made. The Chairman of the Royal Commission had agreed to make available, for the purpose of the review, any relevant material that comes, or has come, to the Commission's notice. In a later reply [2] Mr. Butler stated that there would be opportunities for making submissions to the judges in the course of their review.

Scottish law: Committee on children and young persons

A Departmental Committee is to be set up under the chairmanship of Lord Kilbrandon " to consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control and, in particular, the constitution, powers and procedure of the courts dealing with such juveniles, and to report." [3]

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[1] H.C. Deb., Vol. 636, col. *145*.

[2] H.C. Deb., Vol. 637, cols. 1513–1514.

[3] H.C. Deb., Vol. 636, col. *150*.

The Road Traffic Bill

LEGAL AND MEDICAL COMMENTS

The Government's long-awaited Bill is an interesting hotchpotch of reforms and experiments. After the first six clauses (to which we refer in detail below) the Bill is concerned with a miscellany of mainly technical matters: the Minister of Transport's powers in respect of speed limits are to be increased and made more flexible (minimum speeds will be possible, it is good to see); a register of approved driving instructors is proposed, and one wonders whether in consequence the cautions or courtesies of future generations of drivers will show signs of mass-production, like the handwriting by which you can recognise the discipline of a particular school; bollards and boundary roads receive their specialist and dry-as-dust attentions; and so forth.

Clauses 1 to 6 of the Bill can be considered separately. They constitute a partial attempt to revise the methods of dealing with the offending driver. They are controversial, and their subject-matter is of general interest. They will not achieve statutory form without amendments of substance or detail. But it may, nevertheless, be useful to offer, while the Bill is in its early stages, some comments on proposals which have received much publicity and which require careful parliamentary consideration.

The drinking driver

One of the main problems associated with the drinking driver is the difficulty of securing a conviction. Clauses 1 and 2 of the Bill make proposals to reduce this difficulty, by altering the statutory standard of " unfitness to drive through drink or drugs " and by giving legislative dignity to evidence of the results of chemical tests. The subject is of the first importance and much speculation has existed as to the Government's intentions. The author of the article recently published in this *Review* on " Chemical Tests for Intoxication " [1] contributes his observations upon the answer now vouchsafed:

" Chemical tests for intoxication were considered in relation to the drinking driver in an article which appeared in the January and February issues of this *Review*. As this country is some way behind the rest of the motorised world in its development of a chemical testing programme, particular attention was paid to the experience of those countries where the tests have been in routine use for many years. Reduced to its simplest terms the universal problem is to discourage persons from driving whilst driving ability is impaired by alcohol. Since physical medical examination of suspects is both unreliable and relatively insensitive in detecting impairment, even when conducted by the most experienced doctors, recourse has to be had to chemical tests which indicate the actual concentration of alcohol in the tissues.

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[1] [1961] Crim.L.R. 5–19, 77–86.

Mere impairment of driving ability as a major offence

" Since driving ability is impaired by even small amounts of alcohol it is considered undesirable in other countries that mere impairment of driving ability should be regarded as a major criminal offence carrying conviction on indictment and sentence of imprisonment. All that is needed is a simple procedure carrying disqualification when a person is found driving with a declared concentration of alcohol in the tissues, and preferably without the clamour and stigma of a public prosecution. The clear lesson to be learnt from the experience in other countries is that the branding of the drinking driver as a criminal is a major obstacle in the face of a chemical testing programme. As recently as last November in introducing New York State's most recent traffic Bill, Governor Rockefeller said: ' In requiring the drinking driver to be classified as a criminal, present law has not proved adequate to remove the drinking driver from our highways. . . . The focus of the Bill is upon removing from the highway the driver whose ability is impaired rather than upon branding him as a felon or a misdemeanant. The existing provisions of law remain to cope with the more serious offenders.'

" Accordingly, the article which appeared in this *Review* warned that there was a danger of the cart being put before the horse in relation to chemical testing in this country, and that the grafting of chemical tests on to the existing offence was doomed to failure.

" The new Bill, as printed, provides that a person may be convicted of the existing offence if his ability to drive properly is impaired for the time being.[2] But the existing offence has not been modified in any way to accommodate this new criterion of unfitness to drive nor the introduction of chemical tests in its assessment. The offence remains punishable by imprisonment upon conviction on indictment and will carry just as much stigma as before. The powers of the court to disqualify have been extended, although there can be little quarrel with this as disqualification is the only logical penalty for such offenders.

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[2] Replacing the existing test of unfitness to drive, namely, being " under the influence of drink or a drug to such an extent as to be incapable of having proper control of a motor-vehicle ": Road Traffic Act, 1960, s. 6 (6).

The use of chemical tests

"The new Bill provides that the court 'shall have regard' to the results of chemical tests for intoxication obtained by means of urine, blood or breath sampling. What regard the courts shall have to such results in assessing impairment of ability to drive properly is the big question mark at present. We may presume that the Government means any degree of impairment, otherwise there would have been some qualification in the wording of the Bill, *cf.* 'substantially impaired' in relation to impairment of mental responsibility under the Homicide Act. According to the best scientific evidence there is some impairment of driving ability at very low concentrations of alcohol in the tissues. The report of the British Medical Association's Special Committee, published last year, concluded after an exhaustive study of all the available evidence 'that 50 mg. of alcohol in 100 ml. blood while driving a motor-vehicle is the highest that can be accepted as entirely consistent with the safety of other road users' although 'there may be circumstances in which individual driving ability will not depreciate significantly by the time this level is reached.' On the other hand, Professor Drew, in a very carefully controlled experiment on the effect of alcohol on skills resembling driving, found that he could detect impairment of driving ability in some subjects at concentrations as low as 10 mg./100 ml.

"Conversion of these concentrations into the corresponding amounts of liquor which require to be drunk is not possible with any degree of accuracy owing to the variable factors which were discussed in the recent article in the *Review*, but 50 mg./100 ml. may be produced in a person of average weight within half an hour of drinking as little as one and a half pints of beer or the equivalent of three small whiskeys. This would have to be regarded as the safety limit if the new Bill becomes law and the courts pay attention to the best scientific evidence. Whilst it is in accordance with the law and practice in some countries that persons found driving with concentrations of alcohol in their tissues in excess of 50 mg./100 ml. should be disqualified from driving for a stated period, it is an entirely unique proposition that they should risk a sentence of imprisonment upon conviction on indictment and be regarded as major criminals. In other countries sanctions of this severity are almost invariably reserved for the grossly intoxicated driver, *e.g.*, at concentrations of alcohol in the blood in excess of 150 mg./100 ml., who must have taken at least three times the amount of liquor required to impair the ability to drive properly in order to reach such a state.

Obtaining the suspect's consent

" The recent article in the *Review* also considered in some detail the problem of obtaining the suspect's consent to a sample being taken for chemical tests, and it was concluded that the ' implied consent ' legislation offered the best solution. The essential principle of ' implied consent ' laws is that a person who takes out a driving licence consents to provide a sample upon a reasonable request from a duly authorised officer, and that if he refuses, when so requested, his licence will be automatically suspended. Any problems of consent are, therefore, worked out at the time the licence is taken out and the licensee has plenty of time to think about the consequences.

" The new Bill bristles with difficulties over the question of consent because, although it says the sample must be taken ' with his consent,' it provides that ' his refusal [to consent] may, unless reasonable cause therefor is shown, be treated as supporting any evidence given on behalf of the prosecution, or as rebutting any evidence given on behalf of the defence, with respect to his condition at that time.' Leaving aside the possibility that the suspect may be so intoxicated as to be unable to form the necessary consent, in which case, of course, other evidence of intoxication should be sufficient for conviction, it will often happen that he has been involved in some kind of accident. Even if he has escaped physical injury in the course of the accident, he may well be in such a state of shock that his ability to consent or refuse is defective. Having got over this hurdle what is ' reasonable cause ' for a refusal to provide a specimen? Presumably religious objections of one kind or another are anticipated, but it could be claimed that lack of confidence in the efficacy of the tests might be a reasonable cause for withholding consent. The time to obtain consent is when a driving licence is being taken out and not when the driver is about to be charged with an offence.

Need for standardisation of tests

" Standardisation of the various analytical procedures will be essential under the new Bill. The procedures for testing urine and blood have already been standardised in practice as the forensic science laboratories, to which the police must send all samples, invariably use one of two procedures recommended by a panel of the Royal Institute of Chemistry which was set up to consider the problem in 1954. Breath analysis poses different problems and it seems likely that a standard will be set up by the British Standards Institute which all breath analysis apparatus must satisfy. The apparatus most likely to be introduced in this country is the ' Breathalyser ' which is a reliable and stable instrument and which was described in some detail in the recent article in the *Review*. It is, of course, essential that such instruments should be operated by properly trained personnel. The Bill permits the Home Secretary to authorise persons to make analyses and only the certified results of tests made by authorised analysts may be considered by the courts.

Conclusions

" It is hoped that the Bill will be amended substantially during its passage through the two Houses of Parliament and if this hope is realised it is hardly profitable to consider it further at present. Under the existing law a suspect may consider himself singularly unfortunate if he is convicted in circumstances where his blood alcohol did not exceed 150 mg./100 ml., a concentration which is highly dangerous to other road users, and it is to be hoped that the new legislation will reduce this very high figure below which convictions are hardly ever obtained. The Bill should also reduce the number of cases where persons who were in fact intoxicated have avoided conviction through pleading that their condition was due to some other clinical state. Conversely, it will safeguard the few isolated cases where the suspect's condition has, in fact, been due to a disease process and not to alcoholic intoxication."

Clauses 3 to 6, and Schedule I

Clauses 3 to 6 and the First Schedule are devoted to the amendment of the sanctions available in the case of various road traffic offences. The tendency of the amendments is to reduce the occasions for imprisonment and to stiffen fines and the law relating to disqualification and endorsements. But although this admirable tendency can be discerned, it is hard indeed, on a close examination of the proposals, to perceive the pattern of the scheme of amendments, to see the internal logic of the First Schedule's manipulation of particular penalties.

Disqualification and endorsement

First, as to disqualification. Motor manslaughter and causing death by dangerous driving are added to the list of offences carrying obligatory disqualification (subject to " special reasons " for ordering otherwise). Simple dangerous driving is automatically disqualifiable only if committed twice in three years: so the logically irrelevant fact of a fatality once again causes a distinction in punishment. Driving while disqualified and (back again after a short retirement) driving without insurance against third-party risks also become candidates for obligatory disqualification. Further, three convictions of disqualifiable offences in three years will mean at least six months off the roads, and two convictions in ten years of driving " under the influence " will result in a minimum three-year disqualification. All this is admirable. So is the court's power in the case of any disqualifiable offence to suspend the licence until the offender has passed a driving test—though one hopes that this power would not be too cavalierly exercised outside the range of offences suggesting incompetence as the particular vice.

The list of offences involving discretionary disqualification is more puzzling. There are some excellent additions to the list, especially failure to stop after an accident (which should have been disqualifiable long ago). On the other hand, quite as many offences at present disqualifiable are to cease to be so. What can be the explanation for removing the threat of disqualification from the young motor-cyclist who transports his girl-friend " otherwise than sitting astride the cycle and on a proper seat securely fixed to the cycle behind the driver's seat " ? (Act of 1960, s. 8). Why should magistrates never have power to disqualify those driving without licences or permitting persons under age to drive (to take examples only)? Why cannot the joy-rider (s. 217 (1)) be disqualified and thus deprived of even the legitimate pleasure of driving his own vehicle?

The law relating to the endorsement of licences is to be stiffer: conviction of any disqualifiable offence will be automatically endorsed. Many drivers, particularly professional drivers, have an exaggerated fear of endorsements, apparently believing that the licence's not being " clean " has a significance over and above the fact of the conviction. Perhaps, therefore, some small irrational benefit might result if some publicity were given to the proposed extension of compulsory endorsement.

Fines and imprisonment

Many maximum fines are to be raised, the most common increase being from £20 to £50. Much will depend, so far as the practical results of this are concerned, upon the degree to which the increases in the maxima are reflected in the fines actually imposed by the courts. It is doubtful whether a mere legislative increase has any deterrent effect; but what happens in court to my mate or my neighbour may very possibly have some influence upon me. Some magistrates' courts have tended to impose bigger fines for careless driving since the maximum was increased by the 1956 Act. In others a fine of £3 or £5 is still the normal thing. Local variations may become even more startling than at present if the many amendments now proposed become law.

Fines will go up. But imprisonment will be possible for fewer road traffic offences than hitherto. It is in this department of fines and imprisonment that the logic of the Bill is particularly hard to discover. Why some fines rise and some do not; why some rise by £30 and some by £10; why, for example, driving without a licence will no longer be imprisonable on a second conviction, but a second conviction of failure to comply with the conditions of a provisional licence will remain imprisonable: these are some of the mysteries.

A dilemma and a doubt

Driving while disqualified may in the future present the defence with a dilemma. At present imprisonment (up to six months) is automatic in the absence of special reasons. This will remain true on summary conviction. But the offence is to become indictable and punishable on indictment with imprisonment (up to a year) *or* a fine or both. Will the defendant dare to elect to go for trial? Will he dare not to? Perhaps the dilemma will in practice be resolved by assuming that quarter sessions will be no more lenient than the magistrates would have power to be (*i.e.*, where there are no special reasons, will imprison): in which case the defendant will be content to accept summary trial. But if that assumption were right, there would be no justification for the extraordinary distinction between the powers of the two courts.

While again on the subject of the disqualified driver, we may notice clause 4 of the Bill, which provides that application for the removal of a disqualification imposed by or on appeal from a magistrates' court shall be made to a court of quarter sessions having a legally qualified chairman. The clause reads as a rebuke to the lay magistracy, who may have been thought to be over-indulgent to the penitent and inconvenienced applicants who come before them. There is, no doubt, some reason of policy behind the clause: presumably it is desired to encourage greater strictness or uniformity in the way these applications are dealt with. But it is a proposal requiring very careful thought. This is an age of lavish legal aid: most people can either afford or be given reasonably competent representation in the criminal courts. Legal aid is not possible, however, on an application to restore a suspended licence. Since solicitors have no right of audience at quarter sessions, the applicant will have to find money to instruct a solicitor and counsel or will have to rely on his own advocacy. Many applicants are professional drivers whose livelihoods have been affected by the suspension. So the clause effectively distinguishes between rich and poor, and one doubts whether there is not some fairer way of achieving the ends to which the clause is directed.

The Trial of George Riley—A Criticism

By L. J. Blom-Cooper,

Barrister-at-Law

George Riley, who was hanged at Shrewsbury Jail on February 9, 1961, for the capital murder of a 62-year-old widow, should never have been convicted of the capital offence, let alone have had his petition for a reprieve refused. That is the clear conclusion to be drawn from a reading of the transcript of the proceedings at Stafford Assizes last December when, before Mr. Justice Barry and a jury, Riley was found guilty of murder " in the course or furtherance of theft."

The very strong abiding impression that is left after wading through the record of a six-day trial—337 foolscap pages—is that Riley did kill Mrs. Adeline Smith, an impression that is hard to dispel because no other remotely possible suspect exists; there is no " Christie " around as there was in the Evans case. And yet when asked to substantiate this " impression " everything about the evidence of the trial indicates doubts whether a conviction was properly arrived at; stealing seems to be the most logical explanation for a dastardly murder but there are even more doubts whether stealing was really Riley's intention. A finding of guilty of non-capital murder would have been a much less unacceptable result from the jury who, however, were not properly directed on the point about the murder having been committed " in the course or furtherance of theft."

The summing-up

In the *Observer* for February 5, it was recorded under the headline " Another Evans case? " that the summing up of Mr. Justice Barry was impeccable and that Riley's counsel could not be faulted for having told the Court of Criminal Appeal that there was no point which he could properly advance in argument to the appeal judges. It is notoriously easy to say that a summing-up is faulty; it is almost a miracle that our judges so often manage to approach perfection in such a tricky task. It is also easy to be wise after the event and suggest that counsel conceded too readily that the direction to the jury could not have been bettered. A famous Queen's Counsel once gave it as his opinion that there never was a case in which there was absolutely no point to argue. Every case presents matters on which there can be argument even if the hopes for reversing the decision are minimal. But in the case of Riley the summing-up was defective in some respects and should have been challenged in the appeal court, if not by counsel then by the judges who heard the appeal.

Evidence of theft

Riley's statements

There are two avenues of inquiry which could have been pursued on appeal, one relating to the truth of Riley's statement and the other to his committing murder in pursuance of theft. The only evidence—and unlike the question whether he killed the woman, literally the only evidence—of theft was Riley's own statements. Apart from the written statement made earlier during his stay in the police station, Riley was supposed to have said to Sergeant Phillips that " She was alive when I left her. I wanted some money . . . ," a remark which he repeated in writing. In the written statement he said " . . . the next thing I recollect I was in Mrs. Smith's house and I was after some money. I had spent more than I meant to that night. I knew she had lots of money and knew she kept her hand-bag upstairs because I had been to her for change and always saw her run upstairs for it. . . . I did not take anything at all from the house. . . . I am very sorry things ended like this; I didn't want to harm her, I only wanted some money."

It was abundantly clear that there were no signs of theft and no evidence that Riley had taken any money; it could not be said, therefore, that the murder was committed " in the course or furtherance of theft." At most Riley intended to steal but never had the opportunity of taking anything. It could only be a capital murder, therefore, if " theft " included an " intention to steal."

But the definition section in the Homicide Act, 1957, is both ambiguous and cyclical. "Theft," it says, includes "any offence which involves stealing or is done with intent to steal." What is this "offence"? It cannot be the murder, which is the very thing the court is inquiring into. It must refer to some other offence than the killing, such as housebreaking. This was never explained by the judge to the jury. The jury might have had their doubts whether Riley broke into Mrs. Smith's house, since the broken window was so narrow that a neighbour in daylight the next morning and taking precise care cut himself on the glass when trying to gain entry.

Riley's intention

Even then, did Riley exhibit an intention to steal? Intention indicates that a man is consciously shaping his conduct so as to bring about a certain event, whereas motive indicates the reason why he desires that event and, therefore, why he pursues this selective course of conduct so as to achieve it. Isn't Riley's statement as consistent with an expression of motive as with an intention to steal? If the jury had been directed on this point by the judge they might have found such a legal argument to be sophistry; they may have said to themselves that Riley obviously killed the woman in a panic while trying to steal her money. But since Riley knew the woman and had gone to her for change in the past it is not wholly improbable that he was going to borrow money. At least borrowing would be wholly consistent with his statement and with the entire evidence of the crime.

Non-capital murder as an alternative

And if these points had been put to the jury, if they had been told that there was the alternative verdict of non-capital murder, might they not have grasped at such a compromise simply because of slight nagging doubts about Riley's guilt of murder itself? If they were certain that Riley would be sentenced to life imprisonment they might the more easily have solved their initial doubts about the killing itself. Their only real alternative to bringing in a verdict of capital murder, as put to them by the judge, was an acquittal, which would have been as unthinkable as it was in the Evans case. Manslaughter as an alternative was impossible in view of the severe blows which had been inflicted upon the widow.

It was not beyond reason for the judge to have directed the jury that they might accept the statement only as to that part in which Riley confessed to the killing. So far as the murder was concerned there was some, although not very much, evidence of a corroborative kind. The prosecution conceded that no single one of the few pieces of evidence, if produced by itself, was sufficient to convict Riley, but with the pieces of evidence taken together all the evidence was consistent with Riley's statement being true. On the theft aspect of the crime there was, however, no other evidence consistent with Riley's statement; there was only a strong inference to be drawn from the bare words of the statement itself.

None of this did the judge put to the jury; when they left the jury box after three or more hours of summing up they were left with the alternative of finding capital murder or acquittal. It is little wonder that the jury should have been forced after two hours in the jury room to bring in a verdict of capital murder.

The relation of other facts in the summing-up

There are other items of criticism of the relation of the facts in the summing-up. The judge omitted any reference to the missing piece of wallpaper that is said, by the Attorney-General in the recent Commons debate, to be still in existence; he did not point out that Riley was right-handed and had been wearing his ring, which the prosecution demonstrated had a tiny spot of blood on it, on his left hand; and that despite the medical evidence that if blows were delivered by a piece of jewellery there would be bruising underneath the ring, no mention was made that the police slipped the ring off Riley's finger with the greatest of ease.

There was also no comment on Sergeant Phillips' cryptic and misleading reply to Riley's question, " what is capital murder Serg? " Either Phillips should have refused to answer, because the question was one that Riley should put to his legal advisers, or he should have given him the correct answer. Instead, when asked whether murder in the course of breaking into a house was capital murder he replied: " It could be." Riley may well have made a less incriminating statement if he had had a clear-cut reply to his question. Just to have killed an old woman for the sport of committing acts of violence sounded too outrageous. To kill in a panic when looking around to steal a woman's money sounds much less heinous, even though that crime is capital murder whereas the mere killing of the woman would be the lesser offence of non-capital murder. If he had known that murder in pursuance of theft was punishable by death would his statement have been the same?

Above all there now appears a plausible reason for the police view that they had their man in Riley. Inspector Brumpton visited Riley's house immediately after he had seen the prostrate body of the old woman bathed in congealed blood, and blood bespattered on the bedroom walls. When he went to Riley's room he found a garment lying on a chair which was stained with a dark red substance; it turned out to be floor polish from the dance hall where Riley had been that night. But Brumpton, unaware at the time of the analyst's report on the garment, was not unnaturally certain that it was the victim's blood. Armed with this conviction it would not have been surprising if the Inspector had indeed suggested to Riley that the crime had been committed in the manner described by Riley in his statement and during the trial.

The best we can do?

We are most insistent in our legal system to ensure safeguards against self-incrimination; and yet at a time when a man is at the mercy of his own follies, is subject to stress and emotion if not to the suggestive promptings of his interrogators during long hours in custody and without legal or other advice, we accept avidly the most damning indictment of an accused made by himself and allow him to go to the gallows on that statement, unsupported by any cogent external evidence. Our judicial system may be the best human beings can devise. If that is so, then we must recognise that the best may sometimes not be good enough. It certainly fails to satisfy me that it provided justice in the case of George Riley.

The Mental Health Act and the Criminal Offender

By J. D. J. HAVARD, M.A., LL.B., M.B.,
Barrister-at-Law

The Mental Health Act, 1959, is a monumental piece of social legislation consisting of 153 sections (almost twice the number in the National Health Service Act, 1946) divided into nine parts, and eight schedules. Of this only one part (Part V), comprising some twenty-one sections, is directly concerned with the criminal law. The Act has repealed virtually all the pre-existing legislation relating to mental health and the gathering together of the vast network of legislation relating to the subject is an achievement in itself. In addition the Act has introduced a large number of new measures which may be said to have revolutionised the approach to the treatment of mental disorder. The passage of this great Bill through Parliament provided a marked contrast to the fate of its most famous predecessor, the Bill of 1845. On that occasion the Earl of Shaftesbury noted in his diary that he " had toiled through obstruction, insolence, destruction, delay to the third reading." On this occasion the passage of the Bill was marked by a high level of debate and it was clear that Members were deeply conscious of the fact that they were making social history.

Provisions not concerned with the criminal law

In order to keep in proportion the importance of the sections of the Act concerned with the criminal law it is necessary to mention a few of the other major changes instituted by the Act. Conditions have changed so much during the present century that much of the law existing at the time the Act was passed had become out of date. The compulsory powers exercised as " certification " were serving a very different purpose from what had been intended. Certification under the Lunacy and Mental Deficiency Acts was intended primarily to ensure that patients were qualified to be treated at the public expense in the hospitals and institutions set up under those Acts, and certification was, therefore, the only way in which a patient could be admitted to such hospitals. In 1930 the Mental Treatment Act made it possible for patients to be admitted as temporary or voluntary patients without " certification " to mental hospitals, but not to mental deficiency hospitals. Admission as a patient under the Mental Treatment Act required certain formalities which limited its effect to such an extent that " certification " under the Lunacy Act remained the usual method of admission. In 1948 the primary purpose of " certification " became completely obsolete through the introduction of the National Health Service Act which provides free hospital treatment to all.

Amongst other things the Mental Treatment Act, 1930, did away with certain terms under the Lunacy Act which had already become terms of abuse. Hence, " lunatic " was replaced by " person of unsound mind " and " asylum " was replaced by " mental hospital." This process has been carried to its logical conclusion by the new Act which has virtually cleared the board of all terms likely to stigmatise ill health in the lay mind. All the categories under the Mental Deficiency Acts, *e.g.*, " idiots," " imbeciles," " feeble-minded persons," have been done away with, and the term " mental hospital " has been abolished so that there is no longer any outward and visible sign that a person is being treated for mental disorder, whether under compulsory powers or otherwise. The formalities required by the Mental Treatment Act before a patient can be treated as a voluntary patient have been done away with, and the old " certification " and more rarely used " inquisition " methods of compulsory admission have been replaced by newer, simpler and, if anything, more extensive powers. The Board of Control has been abolished and its functions have been transferred to local authorities and the newly constituted mental health review tribunals.

So far as the new compulsory powers of obtaining admission to hospital for observation or treatment are concerned, it will be easier both to get patients into hospital under compulsion and to obtain their discharge. It is not expected that it will be necessary to exercise these powers very often, as patients should be less reluctant to enter hospital voluntarily for treatment under the new régime. The whole emphasis is on the early treatment of mental disorder and the early return of the patient to the community. In fact for many years the number of patients detained in hospital under compulsory powers has been decreasing, whereas the number attending as out-patients has more than doubled over the past few years. Based largely on the recommendations of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency (Cmnd. 169) the Act reflects the new and enlightened approach to the treatment of mental disorder and has placed us in the forefront of those countries with progressive legislation on the subject.

Powers of the courts to order admission to hospital

The types of mental disorder

It is proposed here to review shortly the powers exercised by the courts before the Act came into force, with those changes introduced by the Act. Before this can be done it is important to have some idea of the types of mental disorder likely to come before the courts. At the risk of dangerous over-simplification the problem can be presented as follows:

1. There are those cases which satisfy the test of the M'Naghten Rules with which all students of criminal law are familiar.
2. There are those cases which are considered to be insane in the medical sense of the term. Such people are unable to appreciate objective reality, *i.e.*, they cannot distinguish between what is going on in their own minds and what is happening in the outside world. Since such persons may know what they are doing at the material time, and may know that it is wrong in the sense that it is contrary to the law, they do not necessarily come within the test of the M'Naghten Rules. Although they are not in the medical

sense responsible for their actions they may be legally responsible under the M'Naghten test.

3. There are those cases which are insane neither in the medical nor in the legal sense of the term, but may attract the defence of diminished responsibility through some form of mental impairment. Intellectual impairment is the most common type accepted under this defence, but it now seems that emotional impairment, as characterised by certain aggressive psychopaths given to compulsive behaviour, may be let in.[1]
4. There are those cases which come under none of the above categories but are found to be suffering from some form of mental disorder and are considered likely to benefit from treatment.

The position before the Act came into force

1. Under the Criminal Lunatics Act, 1800, and the Trial of Lunatics Act, 1883, persons found " insane on arraignment " and therefore unfit to plead, and persons found " guilty but insane " after trial on indictment, were dealt with as Broadmoor patients. The verdict " guilty but insane " applies only to those satisfying the M'Naghten Rules.
2. A person found to be " of unsound mind " and " a proper person to be detained," *i.e.*, certifiable under the Lunacy Acts, could be made the subject of a hospital order by a magistrates' court if he had been charged with an act or omission punishable with imprisonment and the court was satisfied that he had done the act or made the omission charged (Magistrates' Courts Act, 1952, s. 32). This applied only to magistrates' courts and the effect was that the courts were exercising the certification procedure which would normally have been applied if the mental condition had been discovered otherwise than through an offence being committed. Both magistrates' courts and higher courts could make an order sending a mental defective into an institution or into guardianship (Mental Deficiency Act, 1913, s. 8 (1)). Again this depended upon the person being " certifiable," in this case under the Mental Deficiency Acts, and the same principle applied, *i.e.*, the court must have found that he had committed an act punishable with imprisonment. Under both these procedures the person became subject to the normal rules governing persons admitted under certification

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[1] *Byrne* [1960] 3 W.L.R. 440; [1960] Crim.L.R. 763.

procedure, *i.e.*, the orders remained in force for the same length of time and were renewed in the same way as with ordinary patients, and detention was not affected by any term of imprisonment the court might otherwise have imposed.

The procedure was not always popular with relatives in the case of mental defectives as the detention generally lasted for longer than would a term of imprisonment owing to the considerable length of time over which treatment is needed for the condition.

3. Persons willing to undergo treatment voluntarily could be sent for treatment as a condition of probation under the Criminal Justice Act, 1948, s. 4, or as a condition of bail under section 26. The period of the conditional term was limited to a maximum of twelve months unless the prisoner was subsequently found to be "certifiable."
4. The Home Secretary could order the transfer from prison or approved school of a person to a Broadmoor institution, mental deficiency hospital, or to guardianship. Under the Criminal Lunatics Act, 1884, this included persons found to be insane while in prison or awaiting trial on remand as well as those serving sentences and under respited sentence of death. Under the Mental Deficiency Act, 1913 (s. 9), this did not apply to those detained on remand or awaiting trial or sentence. In both cases discharge was not allowed during the period of the original sentence of imprisonment unless the consent of the Home Secretary was given.

Defects of the system

The powers of the courts to order treatment instead of prison sentence were, therefore, somewhat limited. The position was particularly unsatisfactory where prisoners set up a successful defence of diminished responsibility under the Homicide Act and required prolonged treatment as unless they were "certifiable" the only alternative was to send them to prison where there was very little chance indeed of the necessary treatment being given. The sentencing of mentally disordered persons to terms of imprisonment was one of the most unsavoury features of our penal system before the Act came into force. Although it is theoretically possible for prisoners to receive psychiatric treatment, there is, in practice, only one procedure available, namely to transfer the prisoner to the Wormwood Scrubs unit where about 1,300 prisoners await treatment in a psychiatric unit which can only deal with about thirty prisoners at a time. Nor is public security more than temporarily protected by the imprisonment of a mentally disordered offender as he is inevitably released into the community, untreated and very often more disturbed than ever, at the termination of his sentence. The tale of one Burkitt provides an appalling illustration of this kind of thing. In 1915 Burkitt was convicted of the manslaughter of a married woman with whom he had been living, and was sentenced to twelve years' imprisonment. Following release from prison he committed an almost identical killing and was sentenced in 1925 to a further ten years' imprisonment. Following release from his second term of imprisonment he committed yet another almost identical killing and was sentenced in 1939 to life imprisonment. He was a mentally disturbed man who attempted to commit suicide after each of the later killings.

For some time before the Act there were signs that the judiciary were not exactly happy about the position. In *Cowburn* (1959),[1a] Lord Parker C.J. expressed the hope that it would be possible for oversexed aggressive psychopaths to be given treatment when the Act came into force. In other cases judges, when sentencing persons to imprisonment following a successful defence of diminished responsibility, have been at pains to emphasise to the convicted offenders that the sentence is in their own interests and not to be regarded as a punishment, *e.g., Tickell* (1958)[2]; *Rowley* (1960).[3] On the other hand there have been cases before the Act came into force where the prisoner had qualified for hospital treatment and yet was sentenced to imprisonment by a judge. In one such case the accused, who was under 21, and just on the certificable side of feeble-mindedness, set up a defence of diminished responsibility when charged with murder. The defence was successful and it was open to the judge to send him to an institution under section 8 (1) of the Mental Deficiency Act, 1913. However, the accused was sentenced to life imprisonment and on appeal against sentence the Court of Criminal Appeal held it to be entirely within the discretion of the judge whether or not he took advantage of the provision in the Mental Deficiency Act.[4] In fairness it should be added that the defence of diminished responsibility introduced by the Homicide Act, 1957, had brought within section 8 (1) convicted murderers who would not otherwise have qualified, and that under section 8 (1) the accused became subject to the general law relating to mental defectives so that the consent of the Home Secretary would not be required for release. Presumably the judge had some fears that the accused might be prematurely released by those in charge of the medical treatment. The situation under the powers given to the court by the new Act is rather different, as will be seen shortly, and it is to be hoped that the judges will be satisfied that sufficient steps have been taken to prevent premature discharge of patients admitted to hospitals under court orders.

[1a] *The Times*, May 12, 1959; [1959] Crim.L.R. 554.

[2] *The Times*, January 24, 1958.

[3] *The Times*, July 19, 1960.

[4] *Speake* [1957] Crim.L.R. 683; 41 Cr.App.R. 222.

Powers under the new Act apply only to those cases where the sentence is not fixed by law. It follows that the mentally disordered person charged with capital murder must be successful either on a plea of diminished responsibility or under the M'Naghten test if he is to avoid execution.

Changes introduced by the Act

Perhaps the greatest change of all has been the widening of the categories of mental disorder which can qualify for consideration by the courts for treatment in hospital instead of sentence. This has arisen by virtue of the powers given to the court under Part V of the Act, which will shortly be considered, applying to all persons coming before the courts and found to be suffering from one of the forms of mental disorder defined in the Act. Mental disorder is defined as " mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind " (s. 4 (1)). Mental illness is not itself specifically defined, but incomplete development of the mind is subdivided into " severe subnormality " and " subnormality." Perhaps the most controversial innovation is the inclusion of " psychopathic disorder " which the Act defines as " a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and requires or is susceptible to medical treatment." It may be regarded as extremely courageous of Parliament to attempt to define psychopathic disorder in the light of the controversial nature of the condition. Indeed the Royal Commission advised strongly against any statutory definition being attempted. Both legal and medical correspondents have not been slow to criticise the new statutory definition, but there is a uniform reluctance to suggest a better one.

The position since the Act

Compulsory admission to special hospitals

Of the procedures described as being in operation before the Act those concerning persons found " insane on arraignment " and " guilty but insane " remain unaffected. The State institutions are now known as " special hospitals " (s. 97 (3)) and are placed under the control of the Minister of Health, who is given power to provide " such institutions as appear to him to be necessary for persons subject to detention under this Act " who " require treatment under conditions of special security on account of their dangerous, violent or criminal propensities " (s. 97 (1)). Applications for admission or transfer of a patient to a special hospital must be made to the Ministry of Health and not directly to the special hospital.

Compulsory admission to ordinary hospitals

The powers of the courts to make hospital or guardianship orders have been greatly extended by sections 60 and 61 of the Act. Where a person has been convicted before a court of assize of an offence (other than an offence the sentence for which is fixed by law) or is convicted by a magistrate's court of an offence punishable on summary conviction with imprisonment, the court may make an order provided it is satisfied:

(a) on the evidence of two doctors, at least one of whom is approved under section 28 of the Act, that the offender or child or young person is suffering from mental illness, severe subnormality, subnormality or psychopathic disorder of a nature or degree which warrants his detention in hospital for medical treatment or his reception into guardianship; and

(b) that a particular hospital is willing to admit the patient within 28 days, or that a local health authority or other person approved by a local health authority is willing to receive the patient into guardianship; and

(c) that in the circumstances of the case the making of a hospital order or guardianship order is the most suitable method of disposing of the case.

A doctor approved under section 28 of the Act is one who is recognised by the Local Health Authority as having special experience in the diagnosis of treatment of mental disorder. Where a person is merely charged before a magistrate's court and the court would have had power on convicting him of the offence to make an order as a person suffering from mental illness or severe subnormality, it may, if it is satisfied that the accused did the act, or made the omission charged, make such an order without convicting him. Where the court exercises its powers to make an order under this section it must not pass sentence, impose a fine, or make a probation order.

Powers of juvenile courts

No order may be made by a juvenile court unless it is satisfied that the parent or guardian understands the result which will follow from the order and consents to its being made (s. 61 (2)). Lord Winster criticised this restriction during the third reading of the Bill in the House of Lords (H.L. Deb., Vol. 216, col. 731) and the Lord Chancellor replied that none of the orders under Part V of the Act can be made in respect of children beyond control without the parent's consent (col. 765).

Restriction orders

Where it is thought necessary for the protection of the public, in view of the nature of the offence, that the person should not be set at large, the courts (with the exception of magistrates' courts) may make a restriction order (s. 65). If a magistrate's court feels a restriction order is necessary it can commit an offender, of over the age of 14, to quarter sessions (s. 67). While awaiting the hearing at quarter sessions the offender may be detained at a hospital on the magistrate's order (s. 68) where he will be treated as if under a restriction order.

During the period of a restriction order, the patient may not be discharged, given leave of absence, nor transferred to another hospital without the consent of the Home Secretary. Under section 66 the Home Secretary has power to discharge the patient either absolutely or conditionally, a conditionally discharged patient being subject to recall during the period of the restriction order. Both the Home Office and the local police will be informed if a patient under a restriction order is absent from hospital without leave for more than 24 hours. Police constables are including amongst the persons authorised under section 40 of the Act to retake patients who are liable to be detained in hospital under any of the compulsory powers contained in the Act. They are similarly authorised under section 140 of the Act to retake patients who escape while being conveyed from one place to another under the Act, or who escape from a " place of safety " or from custody under the Act. If the police are unable to obtain entry to premises in order to retake a patient they may obtain a warrant from the justices under section 135. When a restriction order ceases to have effect, either by expiration of the stated period, or by the direction of the Home Secretary under section 66 (1) the patient is treated as though he had been admitted to hospital on a court order without restriction, *i.e.*, the patient and his nearest relative have the right to apply to a Mental Health Review Tribunal under section 63 (4).

The whole trend of Part V of the Act is to treat those persons coming before the courts who are found to be in need of treatment for mental illness on the same footing, so far as is practicable, with other mentally ill persons, *i.e.*, those who have not been charged with an offence. Accordingly, the effect of a hospital order without restriction under section 60 or section 61 is the same, with two exceptions, as an application for admission for treatment under that part of the Act (Part IV) which deals with compulsory admission to hospital of persons not involved in court proceedings. The first exception is that the nearest relative has no power of effecting discharge of the patient, and must instead apply to a Mental Health Review Tribunal under section 63 (4) which gives him the right of application at annual intervals. The second exception concerns patients suffering from psychopathic disorder or subnormality, who in ordinary circumstances must be discharged automatically from hospital upon reaching the age of 25 unless the responsible medical officer (senior medical officer in charge of the case) certifies that release would be dangerous to the patient or to others. This provision does not apply to a person admitted under a court order, even though he may have been under 21 at the time the order was made. But he has the same right as a person not admitted under a court order to apply to a Mental Health Review Tribunal at any time during the six months following the making of the order.

There are still further exceptions where the offender is admitted under a restriction order. Neither the patient nor the nearest relative may apply to a Mental Health Review Tribunal but the Home Secretary may refer the case to the Tribunal for advice at any time, and the patient may require him to do so in writing at any time after a year following the order (s. 66 (6) (7)). Patients may not be given leave of absence nor transferred to other hospitals or guardianship without the Home Secretary's consent. The responsible medical officer (senior medical officer in charge of the case) is required to keep under review continually the suitability for discharge of patients subject to restriction orders, and the Minister has asked hospitals to see that formal reports on suitability for discharge in these cases should be made no less frequently than is the case with patients not under a court order.

Treatment as a condition of probation

The powers of the courts under section 4 of the Criminal Justice Act, 1948,[5] are continued. The court will be able to accept the written oral evidence of only one doctor, provided he has been approved by the local authority under section 28 of the new Act, in order to make an order requiring a probationer to receive treatment, the conditions being as before. In the case of a child or young person the court may also make a fit person order.

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[5] See p. 300, above.

Rights of appeal

Orders by magistrates' courts

A patient who has been made the subject of a hospital order under section 60 may appeal to quarter sessions against both the conviction and the order if he pleaded not guilty, but against the order alone if he pleaded guilty. If the appeal is against conviction the sessions may review the whole case, and, if the conviction is upheld, may replace the hospital order by other means of disposal, *e.g.*, sentence of imprisonment. If the magistrate's court made the order without proceeding to conviction the sessions has power to rehear the case. If the patient has been committed to sessions for sentence he may appeal against his conviction.

Orders by courts of assize or quarter sessions

A patient who has been made subject to a hospital order following conviction may appeal to the Court of Criminal Appeal against conviction in the usual way, *i.e.*, within ten days from the day on which the verdict of the jury was returned on questions of law, or on other grounds, *e.g.*, questions of fact, with the leave of the Court of Criminal Appeal or a certificate of the trial judge that it is a fit case for appeal. He may appeal within ten days from the date of sentence against the hospital or restriction order, with the leave of the Court of Criminal Appeal. The Court of Criminal Appeal may quash the order or substitute some other sentence, *e.g.*, imprisonment.

Orders made in respect of persons under 17

A patient who has been admitted to hospital under section 61 of the Act following a finding by the juvenile court that he is in need of care and protection or is beyond control, may appeal to quarter sessions against either the order or the finding on which it was made. He may also appeal against a fit person order made in conjunction with the hospital order. An appeal on behalf of a juvenile patient may be lodged by the parent or guardian, but legal aid is not available.

Medical evidence

The courts may make all necessary hospital or guardianship orders on the basis of written medical reports, but if a restriction order is proposed as well, it must be supported by oral evidence from at least one doctor. Section 26 of the Magistrates' Courts Act, 1952, has been amended to enable the court to make attendance for a medical examination, and if necessary admission for observation as an in-patient a condition of bail, whether on remand or committal. In such a case the responsible medical officer may discharge the patient before expiration of the period of bail if he feels further observation is unnecessary. Where the two doctors decide to recommend admission to hospital, one of them will generally make the necessary inquiries as to available beds, and will inform the court of the position. In practice, of course, the doctor will often be on the staff of the hospital concerned.

Temporary detention in a "place of safety"

If the court makes a hospital order and the patient cannot be admitted into that hospital once, he may be detained temporarily under a court order in a "place of safety" (s. 64 (1)). A place of safety includes any hospital the managers of which are willing to receive the patient, and, in the case of a child or young person, a remand home or any other home provided by the local authority under Part II of the Children Act, 1948. Where admission to a special hospital is recommended application has to be made directly to the Ministry of Health. If no hospital bed is available and treatment as an out-patient or in the care of a local authority is not suitable, the court is thrown back on its usual penal powers, *e.g.*, absolute or conditional discharge or a penalty on the understanding that admission for treatment under Part IV of the Act will be instituted when a bed is available. In other cases a sentence of detention may be more appropriate with a view to the Home Secretary exercising powers of transfer to hospital when a bed becomes available.

Powers of transfer

Under sections 71–79 the Home Secretary may now exercise powers of transfer of patients from prisons, approved schools, or remand homes to hospitals, or from approved schools into guardianship. As with the other orders for compulsory admission under the Act, the recommendation of at least two doctors, one of whom is approved under section 28, must be obtained. Where the prisoner is suffering from mental illness the prison governor will send reports both to the Home Office and the Regional Hospital Board for the patient's home area, and will ask the Board which hospital is able to admit the patient. In all other forms of mental disorder and all approved school and remand home cases the approach will be made to the Board by the Home Office itself after consideration of the reports. If transfer to a "special" hospital is indicated the Ministry of Health will be approached. When it is satisfied that a bed is available the Home Office will issue a "transfer direction" indicating whether or not the patient is subject to restriction on discharge. The responsible medical officer is required to notify the Home Office in writing if he finds that a patient subject to restriction on discharge no longer requires treatment for mental disorder, and the Home Secretary will decide whether the patient should be returned to prison or other institution to complete his sentence, for which purpose a warrant for removal from hospital will be issued. The restriction on discharge imposed by the Home Secretary in exercising his powers of transfer under sections 71 or 72 may be terminated by him at any time. Upon termination or expiration of such an order the patient becomes subject to the procedure already described in cases where a restriction order imposed by the court ceases to have effect.

Where a patient is transferred to a hospital under section 71 after being found insane on arraignment or guilty but insane (*i.e.*, a case of "M'Naghten insanity") he will always be subject to restriction on discharge initially.

Can the Prosecution allege that the Accused is Insane?

By ALEC SAMUELS, B.A.

Barrister-at-Law, Lecturer in Law, University of Southampton

In *R.* v. *Dixon* [1] counsel for the Crown indicated in opening that he proposed to call evidence of the prisoner's insanity. Jones J., sitting at Swansea Assizes, intervened:

"There may have been some special cases in which it has been done but this is not a special case. This is a perfectly ordinary case. I do not see why the ordinary course should not be followed, that is to say, that the defence should raise this point and call evidence. Over and over again this has happened, and what you might call medical witnesses for the Crown, such as medical officers of prisons, have been called by the defence. Why should it not be done in this case?" The judge insisted that it was for counsel for the defence to set up the defence of insanity, and to call evidence in support.

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[1] [1961] 1 W.L.R. 337.

The arguments

Two arguments [2] were relied upon for the proposition that the prosecution could lead evidence of insanity. The first was based on *R.* v. *Bastian* [3] in which Donovan J. held that where the defence have put in issue the state of the prisoner's mind by raising the defence of diminished responsibility, and the prosecution have in their possession evidence indicating that the prisoner was or may have been insane at the material time, counsel for the prosecution is under a duty to call witnesses with a view to establishing insanity and to cross-examine witnesses for the defence, and to invite the jury to return a verdict of guilty but insane. Thus where, before the close of the case for the prosecution, the defence has indicated that they intend to raise the plea of diminished responsibility, the prosecution may call medical witnesses to give evidence of the prisoner's insanity in anticipation of the defence of diminished responsibility. If the defence is not disclosed until after the close of the prosecution's case then prosecution counsel will still be under an obligation to cross-examine defence witnesses on the issue of the prisoner's state of mind, but will be unable to call rebutting evidence unless permitted to do so by the judge in the exercise of his discretion. Leave should not be given if the evidence could have been given in chief and ought to have been adduced by the prosecution before the close of the prosecution case.[4] If *R.* v. *Dixon* (*supra*) is correct then it would appear that the prosecution ought not to adduce their evidence tending to show insanity, but if *R.* v. *Bastian* (*supra*) is correct, where the defence raises the plea of diminished responsibility, leave ought normally to be given to the prosecution to call rebutting evidence. How far ought prosecuting counsel to anticipate the defence of diminished responsibility where it has not been expressly raised and accordingly call evidence of insanity?

The second argument used in *R.* v. *Dixon* (*supra*) was that the medical witnesses for the defence might fail to establish insanity, and that it was in the best interest of the prisoner that the view of the medical witnesses for the prosecution who were going to give evidence of the prisoner's insanity should be accepted. Although on principle in cases of doubt questions of admissibility ought to be resolved in favour of the prisoner, this is different from saying that evidence should be admitted because it would be a good thing for the prisoner if it were believed, since such an argument could be used in support of admitting a great deal of inadmissible evidence. Since those same medical witnesses may be called by the defence to give their evidence, is it to be said that they are less credible by being called by the defence? It may be that the jury would be more inclined to accept evidence of insanity from prosecution witnesses, particularly prison medical officers, since such witnesses might appear to be free from the possible suspicion of bias which sometimes attaches to doctors for the defence giving evidence of insanity. Evidence which may assist the defence seems more convincing coming from the lips of the prosecution witnesses, and the possibility of cross-examination may enable defence counsel to throw a more vivid light on the evidence than if he had to elicit it in chief.

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[2] The various possible arguments were collected and discussed in the article "Can the Prosecution allege that the Accused is Insane?" [1960] Crim.L.R. 453–460.

[3] [1958] 1 W.L.R. 413; [1958] 1 All E.R. 568; 42 Cr.App.R. 75; [1958] Crim.L.R. 391.

[4] *R.* v. *Crippen* [1911] 1 K.B. 149, at p. 156.

Forcing the prosecution's hand

If *R.* v. *Dixon* (*supra*) and *R.* v. *Bastian* (*supra*) are correct and reconcilable, and the defence prefer that prosecution witnesses should nevertheless, as part of the prosecution's case, give evidence of insanity on the part of the prisoner, will it now be sufficient for the defence to raise the defence of diminished responsibility and so come within *R.* v. *Bastian* (*supra*) and oblige the prosecution to call their evidence of insanity? Except in very extreme cases, wherever the state of the prisoner's mind is in issue it should not be too difficult to call medical witnesses whose evidence will enable such a defence to be put forward with some semblance of justification.

Procedure

What, then, assuming *R.* v. *Dixon* (*supra*) to be correct, is the proper procedure to be followed? The general rule is that if the prosecution have in their possession any information which might assist the prisoner they should communicate with the defence. Where they have taken a statement from a person who can give material evidence but decide not to call him they must make that person available as a witness for the defence, though they need not supply any proofs of evidence or statements taken from him.[5] But where the prosecution have in their possession a report or statement by a prison medical officer bearing on the question of insanity, the prosecution must not only make that medical officer available to the defence but also supply a copy of any report or statement made.[6]

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[5] *R.* v. *Bryant and Dickson* (1946) 31 Cr.App.R. 146.

Where a prison medical officer has given evidence of insanity at the committal proceedings he will be bound over or conditionally bound over to appear at the trial. As a result of the recent statement by Lord Parker C.J. in the Court of Criminal Appeal[7] the defence will be aware of whether the binding over is conditional or not.[8] If conditional, the defence must inform the prosecution that they wish the medical witnesses to be present at the trial. They should also subpoena those witnesses; a witness bound over to attend the trial may be subpoena'd. A witness may be subpoena'd on behalf of the prisoner at the trial if he is present in the court, or he may be called if he is present whether or not he has been previously bound over or subpoena'd.[9]

Possible abuse of medical reports by the prosecution

The possibility that there might be some abuse of the prisoner's rights by the making and using of reports by the prison medical officer was raised in the House of Commons by Mr. Leo Abse.[10] He complained that the Prison Commissioners invariably caused a prisoner charged with murder to be examined; that the prison medical officer used methods of persistent interrogation, even where the defence indicated that they did not wish for any examination, and in breach of the Judges' Rules relating to the questioning of persons in custody; and that counsel for the prosecution was often able to use information obtained from the interrogation and contained in the prison officer's medical report for the purpose of making damaging cross-examination at the trial so as to prejudice the prisoner's chance of securing a verdict of manslaughter on a charge of murder, especially where provocation was in issue. Furthermore, the prison medical officer was being placed in a dilemma by being required by the Prison Commissioners to disclose in his report matters discovered in the course of examination of and discussion with the prisoner, contrary to the Hippocratic

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[6] *R.* v. *Oliver Smith* (1910) 6 Cr.App.R. 19; *R.* v. *Casey* (1947) 32 Cr.App.R. 91.

[7] [1961] 1 W.L.R. 502.

[8] The original depositions will contain the letters C.B.O. against the witnesses conditionally bound over and in addition there will be attached a form setting out the names of those witnesses: Form 23 and Rule 12 (2) (*g*) of the Magistrates' Courts Rules, 1952.

[9] *Archbold*, 34th ed., § 1363.

[10] H.C. Deb., Vol. 633, cols. 1313–1324, February 2, 1961 (adjournment debate).

Oath. Mr. Abse asked that the making of an examination and report should only be carried out where the defence put the question of the prisoner's sanity or mental state in issue.

Since in a plea of provocation the question for the jury is whether a reasonable man would have lost his self-control in the material circumstances, it would seem that the character and mental capacity of the prisoner were irrelevant, though perhaps the more unusual, eccentric or unbalanced the prisoner is made to appear the less chance there is of the jury looking upon his behaviour as being that of a reasonable man.

The history of the matter appears to be that in 1883 the Home Secretary, Sir William Harcourt, instructed the Treasury Solicitor, who at that time performed the duties now performed by the Director of Public Prosecutions, that in future where there was reason to believe that a defence of insanity was to be set up in a murder case he should take steps to have the mental condition of the accused inquired into by competent persons before the trial. In 1904, the judges met together and decided that all medical reports obtained by the prosecution must be handed over to the defence and that the issue of insanity was to be raised only by the defence.[11] In 1953, the Royal Commission on Capital Punishment stated [12] that if the prosecution were to be allowed to raise the issue of insanity the legitimate interests of the defence might be prejudiced.

Replying to Mr. Abse, the Under-Secretary of State for the Home Department (Mr. David Renton) said [13]: " I hope that it will be agreed by all who have a knowledge of the administration of the criminal law that it is desirable for two principal reasons that medical reports should be obtained, including reports on mental condition, upon prisoners who are about to stand trial upon a charge of murder. First, the defence may wish to raise a plea of " Not fit to plead," of insanity, of diminished responsibility, or some other defence to the charge of homicide and will not be able to do so unless it is properly armed with adequate medical evidence, recent and thorough. So, in the first place, it may be in the interests of the defence that such evidence should be available. The second reason is this. If such evidence is made available, it should be placed in the hands of the court. The court itself, especially in a case in which it is suggested that the prisoner is not fit to plead, will have to use the same initiative in placing this issue before the jury, and it is therefore right that the court should have the medical report in its possession. As I say, this practice was considered by the Royal Commission, which, for those broad reasons, affirmed it as a sensible practice." Later he said [14]: "These reports are not made in any sense for the purpose of cross-examination by the prosecution and should never be used for that purpose."

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[11] *R.* v. *Oliver Smith* (1910) 6 Cr.App.R. 19.

[12] Cmd. 8932, para. 448.

[13] H.C. Deb., Vol. 633, col. 1319, February 2, 1961.

Of course, the defence, with legal aid available, can always employ their own psychiatrist to examine the prisoner and make a report. Furthermore, following the recommendation of the Royal Commission on Capital Punishment, it is now the practice for the Prison Commissioners to cause the prisoner to be examined by an independent psychiatrist of standing as well as by an experienced member of the prison medical service.[15]

Authoritative statement

In view of the fundamental importance of the whole problem it is greatly to be hoped that the Court of Criminal Appeal, or even the House of Lords, may soon have an opportunity to give a modern authoritative pronouncement.

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[14] *Ibid.*, col. 1322.

[15] H.C. Deb., Vol. 632, col. 74, December 15, 1960, *per* the Home Secretary.

Practice and Procedure

PRACTICE NOTE

Depositions

In the Court of Criminal Appeal on March 6, 1961 ([1961] 1 W.L.R. 502), Lord Parker C.J. said that the attention of the court had been drawn to the fact that defending counsel at quarter sessions and assizes had on occasion been taken by surprise to find that witnesses whom they expected to be able to cross-examine had been conditionally bound over. The original deposition would, of course, contain the letters C.B.O. against the witnesses conditionally bound over, and in addition there would be a form attached (*cf*. Form 23 of the Magistrates' Courts (Forms) Rules, 1952, and Rule 12 (2) (*g*) of the Magistrates' Courts Rules) setting out the names of those witnesses. It seemed, however, that on occasions, when the defence obtained copies of the depositions, either from the committing court or the court of trial, the letters C.B.O. did not appear and Form 23 was not attached. This court, after consultation with the Home Office, had decided to issue this Practice Note drawing the attention of justices' clerks, clerks of the peace and clerks of assize to this situation. Care must be taken to ensure that accurate copies of the deposition were made and, as an added precaution, Form 23 should in every case be attached to the copies, even if it only disclosed that no witnesses were conditionally bound over. In this way it was hoped to avoid the occurrence of mistakes in the future.

*Case and Comment**

MAGISTRATES' COURTS

Magistrates' Courts Act, 1957, s. 1—time for plea of guilty—evidence for prosecution other than that contained in statement

R. v. Norham and Islandshire JJ., ex p. Sunter Bros., Ltd.

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Salmon and Winn JJ.: [1961] 1 W.L.R. 364.[1]

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the applicants: *F. A. Stockdale* (instructed by Doyle, Devonshire & Co. for T. H. Campbell Wardlaw, Newcastle-upon-Tyne). The justices did not appear and were not represented.

In a prosecution against the applicants under the Motor Vehicles (Construction and Use) Regulations, 1955, the procedure under section 1 of the Magistrates' Courts Act, 1957, was invoked. The applicants took no action with regard to the forms sent to them, requiring them to notify the clerk of the court whether a plea of guilty would be entered, but asked for an adjournment, which was granted.

On the day of the adjourned hearing, the court received a letter from the applicants' solicitor, pleading guilty and setting out the mitigating circumstances. At the hearing, the justices heard evidence other than that contained in the statement made on behalf of the prosecution (which had been served under the procedure under section 1 on the applicants). The justices convicted the applicants and sentenced them.

Held, allowing an application for certiorari and quashing the conviction, that once the procedure under section 1 had been invoked, an accused person had the right to enter a plea of guilty right up to the last moment; and that the justices, not having complied with that procedure, had acted without jurisdiction. [D. C.]

Commentary. The Magistrates' Courts Act, 1957, made it possible for the first time, for persons charged with summary offences to plead guilty without appearing before the court and the provisions of the Act must be strictly complied with: *R.* v. *Burnham, Bucks, JJ., ex p. Ansorge* [1959] 1 W.L.R. 1041; [1959] Crim.L.R. 852.

It is wrong to say that the plea of guilty pursuant to the procedure prescribed by the Act must be given by the time fixed by the summons since section 1 (2) specifically refers, not only to the time appointed for the trial, but also to the time appointed for the adjourned trial.

By section 1 (2) (iii) of the Act, if the court proceeds to hear and dispose of the case in the absence of the accused, the court shall not permit any statement to be made by or on behalf of the prosecutor with respect to any facts relating to the offence charged other than the statement of facts which must be served on the accused under section 1 (1) (ii).

Matters raised by accused after plea of guilty which could amount to a defence—onus of proof on the defence—equivocal plea of guilty

Woodhall v. Christal

Newcastle-upon-Tyne Quarter Sessions: Rudolph Lyons, Esq., Q.C., Recorder: February 14, 1961.[2]

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[2] For the appellant: *Allister Lonsdale* (instructed by Samuel Phillips & Co., Newcastle). For the prosecutor respondent: *R. A. Percy* (instructed by Derek Brown, Prosecuting Solicitor, Newcastle-upon-Tyne).

W. was charged before Newcastle City Magistrates on November 14, 1960, with being in charge of a motor-vehicle whilst under the influence of drink contrary to Road Traffic Act, 1960, s. 6 (2). He was not represented by a solicitor and, when the charge was put to him, pleaded guilty. The facts were then outlined by the prosecution. They were that W. had been on the evening in question in a hotel in Newcastle with two others. He had later left the hotel and the police had found him at 10.35 p.m. sitting in the driving seat of his car which was parked outside the hotel and had not been moved. He was taken to the police station where he was found to be under the influence of drink to such an extent that he was quite unfit to have proper control of a motor-vehicle. The police surgeon was then called and gave evidence about his condition when he had examined him. W. was then asked if he had anything to say and he said: " At 8.30 p.m. I realised I had had too much to drink. I handed over the keys of the car to the girl. I was never after in possession of the keys." He added that he had gone to the car to get his coat and have a smoke, and thereafter had fallen asleep. His companions were going to take a taxi home when the police came. His lady friend had had the keys from 8.30 p.m. that night.

The magistrates then fined him £30 and disqualified him from driving for two years. He appealed against both conviction and sentence.

Held, that the account given by W. in the magistrates' court quite clearly disclosed a defence and the case was on all fours with *R.* v. *Durham Quarter Sessions, ex p. Virgo*.[3] The prosecution had sought to draw a distinction that in that case the defence went to the root of the prosecution case, but it did not seem a material distinction.

The real test was, was there an unequivocal plea of guilty? It was material to bear in mind that W. was not represented. Where a man pleaded guilty at a magistrates' court to an offence and later in the hearing put forward facts which could constitute a defence, it was the duty of the magistrates and their clerk to point out to him that what he had said amounted to a defence and to invite him to change his plea. When facts were put before a magistrates' court which indicated that there might be a real defence to the charge, they ought to allow a change of plea, as was frequently done at assizes and quarter sessions.

The case was remitted to the magistrates with an expression of opinion that a plea of not guilty should have been entered (under Summary Jurisdiction Act, 1879, s. 31 (1) (vii) as amended).

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[3] [1952] 2 Q.B. 1.

[JOHN M. COLLINS, Barrister-at-Law.]

Commentary. It is respectfully submitted that the principle of the *Durham Q. S., ex p. Virgo* case was properly extended to the situation where the onus of proof of the matter of defence which is raised by the accused after his plea of guilty, is placed by statute on the defence. The question is whether there has or has not been an unequivocal plea of guilty. A reference by the accused to facts which, unknown to him, amount to a defence if established, render his plea equivocal, wherever the onus of proof lies.

ROAD TRAFFIC

Motor Vehicles (Construction and Use) Regulations, 1955, reg. 73 (1)—interpretation—mischief rule

O'Neill v. Brown

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Salmon and Winn JJ.: [1961] 2 W.L.R. 224.[4]

A fairground showman drove a motor-lorry out of a fairground and along a bumpy road. The lorry was connected to a trailer caravan by an automatic coupling device, consisting of a tow bar attached to the trailer with a socket at the end which fitted over a ball-unit attached to the lorry. The trailer became disengaged from the lorry, veered across the road, and collided with an on-coming motor-cycle. The showman was charged with an offence under reg. 73 (1) of the Motor Vehicles (Construction and Use) Regulations, 1955.

Reg. 73 (1) provides that " Every motor-vehicle, every trailer drawn thereby and all parts and accessories of such vehicle and trailer shall at all times be in such condition . . . that no danger is caused or is likely to be caused to any person on the vehicle or trailer or on a road."

The justices found that the tow bar and ball-unit were of good construction and in good repair, but that the trailer had become disengaged owing to faulty coupling.

Held, dismissing an appeal against conviction, that the justices were justified in finding that it was the faulty coupling which caused the trailer to become disengaged; that reg. 73, being in that part of the Regulations concerned with the maintenance of vehicles and parts and accessories thereof, and having regard to the mischief aimed at by the Regulations, "maintenance" meant that the vehicles, parts and accessories thereof should not only be in good repair, but also in efficient working order; that since the tow bar and ball-unit were improperly coupled, they were not in efficient working order; and that, accordingly, there had been a breach of reg. 73 (1). [D. C.]

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[4] For the appellant: *R. G. Rougier* (instructed by R. I. Lewis & Co.). For the respondent: *Michael Lee* (instructed by J. R. Haslegrave, Town Clerk, Portsmouth).

Commentary. Regulations 73–79 deal with "Maintenance of vehicle." The case is another departure from the rule, now frequently ignored, that penal statutes must be strictly construed—*i.e.*, "if there are two reasonably possible meanings the court should adopt the more lenient one": *Remmington* v. *Larchin* [1921] 3 K.B. 404, 408, *per* Bankes L.J. Instead, the court applied the "mischief" rule. This rule has been applied in a number of recent cases: see, *e.g.*, *Smith* v. *Hughes* [1960] 1 W.L.R. 830; [1960] Crim.L.R. 709. But there is no consistency in the approach of the courts: *cf.* *Fisher* v. *Bell* [1960] 3 W.L.R. 919; [1961] Crim.L.R. 180 and commentary thereon.

Road Traffic Act, 1930, s. 7 (4)—driving whilst disqualified—"special circumstances" for imposing fine

Gosling v. Paul

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Winn and Widgery JJ.: *The Times*, March 1, 1961.[5]

On August 6, 1959, P. was convicted of using a motor-vehicle without third party insurance, and was disqualified from driving for twelve months. On July 10, 1960, P. drove a car. He was convicted of driving whilst disqualified, and fined £5.

The justices found that P. had lost the copy of the order disqualifying him, but had taken no steps to find out the date when the disqualification was due to expire. The justices were of the opinion that, having regard to the fact of the time during which the disqualification was still effective, being only about four weeks, a fine was adequate punishment.

Section 7 (4) of the Road Traffic Act, 1930, provides that a person who drives whilst disqualified shall be liable for imprisonment for up to six months or "if the court think that, having regard to the special circumstances of the case, a fine would be adequate punishment for the offence, to a fine. . . ."

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[5] For the prosecutor: *Anthony McCowan* (instructed by Trower, Still & Keeling for Thomas Mallam, Grimsdale & Co., Oxford). P. did not appear and was not represented.

Held, allowing an appeal by the police, that a special circumstance must be something special and not general, and that the special circumstance must be one which could properly be looked on as a mitigating circumstance.

Per Lord Parker C.J.: "The period of disqualification was a fixed period and the order was meant to be obeyed on every day of that period. Whether the driving took place on the first or the last day of the period had no effect on the gravity of the offence." [D. C.]

Commentary. Section 7 (4) requires the imposition of a sentence of imprisonment unless a fine is adequate "in the special circumstances of the case." Such circumstances must be special to the offence and not to the offender: *Lines* v. *Hersom* [1951] 2 K.B. 682. The same considerations apply as in the case of "special reasons" for not disqualifying under section 15 (2) of the Act. "A 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception": *Whittall* v. *Kirby* [1947] K.B. 194, 201, *per* Lord Goddard C.J. For a case where the court found that special circumstances existed, see *Aichroth* v. *Cottee* [1954] 1 W.L.R. 1124; [1954] Crim.L.R. 795.

Road Traffic Act, 1956—Parking Places (Westminster) (No. 1) Order, 1959—leaving car to obtain change for parking meter

Strong v. Dawtry

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Winn and Widgery JJ.: *The Times*, March 3, 1961.[6]

S. parked his car in a parking bay with a meter in Hertford Street, W.1. He then found that he needed change to pay the initial charge into the meter. He approached a constable about ten yards away, but the constable was unable to give him change. He then obtained change from a taxi driver and returned at once to the meter in order to make the payment. A parking meter attendant had arrived. S. told the attendant what had happened, bringing the constable to confirm his story, and then paid the coin into the meter. S. was charged with an offence under Parking

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[6] For S.: *Raymond Stock* (instructed by J. B. Izod). For the prosecutor: *Sebag Shaw* (instructed by Allen & Son).

Places (Westminster) (No. 1) Order, 1959, and the Road Traffic Act, 1956, and was convicted.

Regulation 8 (1) provides " . . . the amount of the charge for a vehicle left in a parking place . . . shall be one shilling and shall be payable on the leaving of the vehicle in the parking place by the insertion in a parking meter of a coin of the denomination of one shilling or two coins each of the denomination of sixpence. . . ."

Held, dismissing an appeal against conviction, that the car was left in the parking place when it was parked there and not when the motorist departed from it; and that no element of reasonable time could be construed into the Order and the Act, unless it were the time involved in getting out of the driving seat and putting the coin in the meter. [D. C.]

Commentary. The interpretation of "leaving" as meaning "the placing or depositing of the car in the parking bay" is clearly reasonable. If the word meant "departing from" the car, a motorist could sit in the driving seat indefinitely without infringing the regulations. The court's opinion that "payment is to be made as soon as the vehicle is placed in the parking place" is obviously incapable of literal fulfilment. The court recognises that a reasonable time must be allowed for getting out of the car and putting a coin in the meter. This, with respect, completely invalidates the proposition that "no element of reasonable time can be imported at all. . . ." There was, then, nothing to prevent the court from holding that a reasonable time should be allowed for the getting of change.

It is submitted that an unduly restricted and narrow view of the regulations was taken in this case. Lord Parker C.J. recognises, in effect, that the defendant's behaviour was reasonable by expressing his surprise that any fine at all was imposed. It is most unfortunate that a statute, which will affect a great number of the public, should be so construed as to punish the reasonable conduct of an obviously law-abiding citizen, when that course is not clearly required by the statute. The defendant was absent from his car for only two minutes and, as departing from the car has nothing to do with the case, a motorist who spends two minutes in searching through his pockets for the appropriate coin ought equally to be guilty. This, with great respect, is not a very sensible result.

SENTENCE

Sentence of preventive detention for offences committed while released on licence—effect on sentence being served

R. v. Rayner

Court of Criminal Appeal: Pilcher, Sachs and Edmund Davies JJ.: January 13, 1961.[7]

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[7] The applicant did not appear and was not represented.

R. was convicted at quarter sessions of three offences of larceny and three offences of obtaining credit by fraud other than false pretences, and was sentenced to twelve years' preventive detention for the larcenies and twelve months' imprisonment, concurrent, for the frauds. He was forty-five years of age, with twenty-six previous convictions, and was at the time of the offences serving a sentence of eight years' preventive detention. The offences were committed at a time when R. had been released on licence. The sentences now imposed were expressed as concurrent but consecutive to the period of detention to which R. was then liable.

Held, that section 26 (6) of the Prison Act, 1952, provided that: " If a person while released on licence . . . is sentenced by a court in any part of Great Britain to corrective training or preventive detention, the sentence by virtue of which he is on licence . . . shall cease to have effect." Accordingly, the balance of the sentence of detention which R. was serving when he was sentenced for the present offences ceased to have effect and, to that extent, R.'s appeal against sentence would be allowed. [H. P.]

Sentence on one of three counts—conviction on that count quashed —jurisdiction of Court of Criminal Appeal to pass sentence on the remaining counts

The Queen v. Panikkapody Edirimanasingham

Judicial Committee of the Privy Council: Lords Reid, Tucker, Denning and Morris, and the Rt. Hon. L. M. D. de Silva: [1961] 2 W.L.R. 156.[8]

Edirimanasingham, who had been indicted on three counts, one of murder and two of attempted murder, was found guilty on all three counts. The trial judge sentenced him to rigorous imprisonment for life on the murder count, but passed no sentence on him in respect of either of the other two counts.

The Court of Criminal Appeal of Ceylon quashed his conviction on the murder count, and held that section 6 (1) of the Court of Criminal Appeal Ordinance, 1938, of Ceylon, gave them no jurisdiction to pass appropriate sentences on the other two counts.

Section 6 (1) of the Ordinance (which is in identical terms with section 5 (1) of the English Criminal Appeal Act, 1907) provides: " If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some charge or part of the indictment, has been properly convicted on some other charge or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as they think proper and as may be warranted in law by the verdict on the charge or part of the indictment on which the court consider that the appellant has been properly convicted."

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[8] For the Crown: *F. H. Lawton, Q.C.*, and *T. O. Kellock* (instructed by T. L. Wilson & Co.). For Edirimanasingham: *E. F. N. Gratiaen, Q.C.*, *Walter Jayawardena* and *Miss M. K. de Silva* (instructed by Goodman, Derrick & Co.).

On appeal by the Crown against the Court of Criminal Appeal's decision that it lacked jurisdiction,

Held, allowing the appeal, that where the sentence passed on the appellant at the trial had been quashed, the words of section 6 (1) of the Ordinance, in their ordinary and natural meaning, conferred power on the Court of Criminal Appeal to substitute a proper sentence for that which had been quashed, which could only be done by passing sentence on the remaining good counts. [D. C.]

Commentary. In *R.* v. *O'Grady* (1941) 28 Cr.App.R. 33 the appellant had been convicted on seven counts and sentenced to death in respect of two charges under the Treachery Act, 1940, the sentence of death being the only punishment provided. Naturally enough, the judge, Macnaghten J., passed no sentence on the other counts. On appeal, the convictions under the Treachery Act were quashed and a sentence of fourteen years penal servitude imposed on the other counts. The present point was not argued in *O'Grady* and the Ceylon Court of Criminal Appeal said that they were unable to accept the case as having any persuasive force, since it appeared to them to disregard the words of section 5 (1) of the Criminal Appeal Act, 1907. The Privy Council could see no reason for supposing that the decision in *O'Grady* was *per incuriam* and held it to be correct.

TRIAL

Burden of proof

R. v. Jones

Court of Criminal Appeal: Lord Parker C.J., Winn and Widgery JJ.: February 6, 1961.[9]

J. was convicted at quarter sessions of indecent assault on a boy of fourteen years and of attempting to procure an act of gross indecency by the same boy. On the question of the burden of proof the recorder directed the jury as follows: "In all criminal cases it is for the prosecution to prove its case so that, before you can convict him, you are reasonably sure of the accused's guilt. If you think there is a genuine doubt in your minds, then the accused is entitled to be acquitted. In civil cases different considerations apply, but in criminal cases it is for the prosecution to prove its case so that you are reasonably sure of the accused's guilt." On appeal to the Court of Criminal Appeal:

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[9] For the appellant: *R. A. W. Sears* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *D. E. Peck* (instructed by the Director of Public Prosecutions).

Held, that the court could not approve the phrase " reasonably sure " but, used in the context and having regard to the care with which the recorder had dealt with the question of corroboration and his insistence that the jury could only convict if they fully believed the account given by the young boy, the effect which the phrase must have conveyed to the jury was that they were to be sure as reasonable men upon grounds of reason of the guilt of the accused before they returned a verdict of guilty. This court was not, therefore, prepared to hold that the summing-up was bad in law and, accordingly, the appeal would be dismissed. [H. P.]

Burden of proof

R. v. Milne

Court of Criminal Appeal: Lord Parker C.J., Winn and Widgery JJ.: February 6, 1961.[10]

M. was convicted at quarter sessions of driving a motor-car whilst under the influence of drink. On the question of the burden of proof the deputy chairman directed the jury as to the degree of proof but did not say upon whom the burden rested. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that nowhere in the summing-up did the deputy chairman say that the burden of proof was on the prosecution. The issue had been as to the identity of the driver and it was impossible to say what view the jury would have taken if they had been properly directed. In those circumstances this court could not properly apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and, accordingly, the appeal would be allowed. [H. P.]

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[10] For the appellant: *M. H. Gow* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *P. Wrightson* (instructed by the Solicitor, Metropolitan Police).

Burden of proof

R. v. Slinger

Court of Criminal Appeal: Lord Parker C.J., Winn and Widgery JJ.: February 6, 1961.[11]

S. was convicted at the Central Criminal Court of obtaining money by false pretences and of fraudulent conversion. The trial judge directed the jury as to the degree of proof but did not say on whom the burden of proof rested. On appeal to the Court of Criminal Appeal:

Held, that the trial judge had omitted, in summing up to the jury, to say that the burden of proof always rested on the prosecution and that the defendant never had to prove his innocence. In *R.* v. *Oliva* [1961] Crim.L.R. 111, this court had asserted that the jury must be directed in every case (i) that the burden of proof was on the prosecution to prove guilt and not on the defendant to prove innocence, and (ii) that the degree of proof was such that they must feel sure or sure beyond reasonable doubt. However, in the present case, the issue lay between the complainant on the one hand and the defendant on the other and the trial judge put the issue before the jury in the form: " Are you sure that [the complainant] is right or may it be that she is wrong? " In effect the trial judge was saying: " Have the prosecution satisfied you that this . . . happened or may it have been otherwise? " In the circumstances, this court was satisfied that there had been no substantial miscarriage of justice and, accordingly, the appeal would be dismissed. [H. P.]

Burden of proof

R. v. Woods

Court of Criminal Appeal: Lord Parker C.J., Winn and Widgery JJ.: February 6, 1961.[12]

W. was convicted at quarter sessions of shoplifting. On the question of the burden of proof, the deputy chairman directed the jury that they were entitled to convict if they felt " pretty sure " of the defendant's guilt. On appeal to the Court of Criminal Appeal:

Held, that the deputy chairman had used an unfortunate expression in connection with the degree of proof which was necessary in criminal matters. In *R.* v. *Law* [1961] Crim.L.R. 52, this court had quashed a conviction where the expression "pretty certain" had been used. However, in the present case the deputy chairman's direction, read as a whole, made clear that "feeling pretty sure" was to be assimilated to "not having any reasonable doubt." This court felt that, in the context, the expression "pretty sure," though unfortunate, could not give any wrong impression to a jury and, accordingly, the appeal would be dismissed. [H. P.]

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[11] For the appellant: *C. Beaumont* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *P. Wrightson* (instructed by the Solicitor, Metropolitan Police).

[12] For the appellant: *P. Crowder* (instructed by G. L. Barnett & Co.). For the Crown: *J. B. R. Hazan* (instucted by Philip Conway & Thomas).

Judge asleep during part of trial—deficiencies in summing-up

R. v. Edworthy

Courts-Martial Appeal Court: Lord Parker C.J., Winn and Widgery JJ.: February 17, 1961: *The Times*, February 18, 1961.[13]

E. was convicted at a general court-martial of obtaining securities for money on forged documents. On appeal to the Courts-Martial Appeal Court:

Held, that a number of points had been taken on E.'s behalf. It was said that there was no sufficient direction in the summing-up on the question of the documents alleged to have been forged, namely that an alleged omission might have occurred through an honest mistake. Further, it was said that there was no specific direction on the meaning of forgery in the Forgery Act. It was also pointed out that the judge-advocate had made a considerable number of mistakes of fact. It was finally suggested that at one stage of the trial the judge-advocate had fallen asleep; but this would not by itself have affected the trial (except so far as appearances were concerned) provided that he had delivered an impeccable summing-up. No criticism of this trial in itself justified the interference of this court, but there were so many points on which E. might have felt that he did not have a fair trial that after anxious consideration this court had concluded that it was not right or safe to uphold the conviction. Accordingly, the appeal would be allowed. [H. P.]

Commentary. According to the *Manual of Military Law*, Part I, 491–492, the duties of the judge-advocate include being present whenever the court is sitting and ensuring that the accused does not suffer any disadvantage in consequence of his position as such, or of his ignorance, or of his incapacity to cross-examine witnesses, or to make his own evidence clear and intelligible, or otherwise. Even if a sleeping judge-advocate can be said to be present, it is difficult to see how he can fulfil these other functions. The court's observation that, if he delivered an impeccable summing-up, it did not matter that he was asleep during the trial, is surprising.

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[13] For the appellant: *Derek Wheatley* (instructed by the Registrar, Courts-Martial Appeal Court). For the Crown: *E. Garth Moore* (instructed by the Directorate of Army Legal Services).

The Commonwealth Fund Report on the law of evidence in America found that, in those jurisdictions where the judge was not concerned with the weight of the evidence or the credibility of witnesses—" to a lazy judge the temptation to treat a jury trial as an intellectual vacation is almost irresistible. Indeed some judges go to the extent of spending their time in reading a newspaper, writing letters or chatting with friends." The English concept of the judicial function requires a much more active participation in the trial and any relaxation of standards in this respect is to be deplored.

Plea of not guilty mistaken for one of guilty—venire de novo

R. v. Scothern

Court of Criminal Appeal: Lord Parker C.J., Edmund Davies and Widgery JJ.: February 20, 1961.[14]

S. was tried at assizes, *inter alia*, upon an indictment for possessing explosives for an unlawful object. He was recorded in the indictment as having pleaded guilty, and the judge and clerk of assize were clearly of the opinion that he had so pleaded. He was represented by counsel, who took part in the trial as on a plea of guilty. However, S. wrote to the Criminal Appeal Office stating that he had pleaded not guilty, the transcript showed that he had pleaded not guilty and the shorthand writer had verified that that plea was recorded in his shorthand note.

Held, that the proper course was to treat the proceedings on this indictment as a mis-trial. Accordingly, the finding of guilt would be set aside and there would be an order for a *venire de novo*. [H. P.]

Verdict

R. v. Chalk

Court of Criminal Appeal: Lord Parker C.J., Winn and Nield JJ.: January 31, 1961.[15]

C. was tried at quarter sessions on six counts of indecent assault on boys. A different boy was concerned in each count. C. was a schoolmaster and the issue for the jury was, broadly, whether his admitted conduct towards the boys was inspired and accompanied by indecent intention or whether it constituted no more than friendly and innocent familiarity. The conduct alleged in each case was similar. The jury convicted on one count only of indecent assault on T., a boy of twelve years of age. The deputy chairman granted a certificate on the ground that the verdict of the jury was unreasonable having regard to their findings that he was not guilty on other similar counts in the same indictment on similar evidence and, accordingly, C. appealed to the Court of Criminal Appeal:

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[14] For the appellant: *J. J. Deave* (instructed by the Registrar, Court of Criminal Appeal). The Crown was not represented.

[15] For the appellant: *G. R. Swanwick, Q.C.*, and *I. McCulloch* (instructed by Bliss Sons & Covell, High Wycombe). For the Crown: *Geoffrey Lane* (instructed by the Director of Public Prosecutions).

Held, dismissing the appeal, that the proposition that a man acquitted of indecent intention in respect of conduct towards five boys should have performed almost identical acts towards another boy with an indecent intention was, on a first view, almost startling. Nevertheless each count of the indictment had to be separately considered and this court would never substitute its own opinion for that of the jury. In *R.* v. *Hopkins-Husson* (1949) 34 Cr.App. R. 47, it had been laid down that, if there was evidence to go to the jury and no misdirection, this court would not set aside the verdict on the ground that it was one which a reasonable jury could not have arrived at. In the present case there had been no misdirection and it was conceded that there was evidence upon which the jury could have found as they did. Further, some of the other boys spoke of alleged incidents of such an improbable character that the jury could reasonably have rejected their accounts; other boys were shown to have been inconsistent. T.'s evidence was capable of being rationally differentiated in respect of import, consistency and the extent to which factually it was admitted by C. In the circumstances the verdict was consistent with a reasonable as well as a cautious discharge of their duty by this jury and this court could not regard the verdict as unreasonable. The appeal would, accordingly, be dismissed. [H. P.]

Commentary. The facts in *R.* v. *Hopkins-Husson* were very similar to those in the present case with the added fact that the judge expressed his surprise at the verdict. The court affirmed that, while the fact that the trial judge was dissatisfied with the verdict is a matter to be taken into account, it is not in itself a ground for quashing the conviction. The court will not substitute either the opinion of the trial judge or its own opinion for that of the jury where (i) there was evidence to go to the jury, (ii) there has been no misdirection, and (iii) the verdict is one which a reasonable jury could arrive at. The judgment in the present case appears to be so phrased that if the first two of these conditions are present it follows from that that the court will not quash the conviction on the grounds of unreasonableness. This is, with respect, too wide. There are many cases in which there was evidence to go to the jury and no misdirection in which the conviction has nevertheless been quashed on the ground, *e.g.*, of inconsistency in the verdict. See *R.* v. *Cooper and Compton* (1947) 32 Cr.App.R. 102; *R.* v. *Beach and Owens* [1957] Crim.L.R. 687; *R.* v. *Sweetland and Another* (1957) 42 Cr.App.R. 62; [1958] Crim.L.R. 132.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Accessories after the fact

In R. *v.* McINTOSH AND HARRATT the court (Barry, Hinchcliffe and Salmon JJ.: March 14, 1961) reduced sentences of two years' and three years' imprisonment for being accessories after the fact to warehousebreaking and stealing whisky to six months' and twelve months' imprisonment in circumstances where the actual thieves were only fined. M. was a man of forty-three years of age with five previous convictions for dishonesty (1945 to 1948). He had worked well since 1948. H. was a man of thirty-eight years of age with a number of previous convictions but only one prison sentence of three months in 1954.

Assault

In R. *v.* SPYROU the court (Lord Parker C.J., Winn and Widgery JJ.: March 7, 1961) reduced sentences totalling twelve months' imprisonment for assault occasioning actual bodily harm and common assault to such a sentence of imprisonment as would entitle S. to be released immediately. S., who was a man of twenty-eight years of age, was of previous good character. At the time of the offences he was the manager of a coffee bar and the assaults were committed upon three young men who came to the coffee bar late at night when it was closed. The court stated that they had now been informed of a matter which could not have been known to the sentencing court, namely, that the appellant had conducted his business in such a way as to give the police no cause for complaint. Further, the appellant had another coffee bar, which formerly had had a very bad name, and there he had co-operated in every way with the police. In these circumstances the sentence imposed was excessive.

Borstal training

In R. *v*. APPLETON the court (Barry, Hinchcliffe and Salmon JJ.: March 13, 1961) held, following *R*. v. *Gooding*, 39 Cr.App.R. 187, that borstal training was not appropriate for a young man who had just served a term in a detention centre. The appellant was seventeen years of age.

Breach of probation

In R. *v*. GRAFTON the court (Barry, Hinchcliffe and Salmon JJ.: March 13, 1961) reduced a sentence of three years' imprisonment to one of two years' imprisonment on the ground that the appellant had not been given the opportunity of putting forward to the sentencing court any explanation or mitigation. The court pointed out that, although not compulsory, it was right that a prisoner who had been found to be in breach of probation should be given an opportunity of stating such facts by way of explanation or mitigation as he might wish.

Demanding with menaces

In R. *v*. O'NEILL the court (Edmund Davies, Winn and Widgery JJ.: March 17, 1961) refused to disturb a sentence of ten years' preventive detention for demanding £2 with menaces and assault where the offence was one of demanding " protection money " from a street trader and subsequently assaulting him. The appellant, who was a man of thirty-seven years of age, had a number of previous convictions, including four for violence. The court stated that the sentence was well merited for the protection of the public.

Larceny

In R. *v*. DOXFORD the court (Barry, Hinchcliffe and Salmon JJ.: March 13, 1961) reduced a sentence of eight years' preventive detention for stealing £16 to eighteen months' imprisonment where D. had tried for a substantial period to live honestly. D. was a man of thirty-five years of age with seven previous convictions for dishonesty, three for indecency, one for assault and one for attempted suicide. His last conviction for dishonesty was in 1956. Subsequently, in 1957, he was sentenced to three years' imprisonment for assaults and was released in May 1959. He then worked well until November 1960 when he was arrested for the present offence.

Living on immoral earnings

In R. *v.* McKay the court (Lord Parker C.J., Ashworth and Elwes JJ.: October 10, 1960; 110 L.J. 720) refused to disturb a sentence of seven years' imprisonment for living on immoral earnings where the appellant had driven his wife onto the streets by threats and violence for the purpose of earning money for him by prostitution. The appellant, who was of previous good character, had married his wife, then aged sixteen, in 1953.

Obtaining by false pretences

In R. *v.* Monaghan the court (Barry, Hinchcliffe and Salmon JJ.: March 13, 1961) varied a sentence of three years' corrective training to one of eighteen months' imprisonment where a man of thirty-four years of age had a fair work record and only two relatively minor previous convictions (in 1954 and 1956). The court also pointed out that there had been no report from the prison commissioners in this case indicating whether or not the appellant was a man likely to benefit from or respond to corrective training.

Road traffic offence

In R. *v.* Smith the court (Lord Parker C.J., Winn and Widgery JJ.: March 6, 1961) varied a sentence of twelve months' imprisonment for pavilion-breaking on breach of probation to another probation order, where the breach was constituted by conviction for motoring offences and where S. had responded well to the previous order.

Sentences in the Scottish Court of Criminal Appeal

Prepared by Alistair Brownlie, s.s.c.

Fraud and uttering

In Wright *v.* H.M. Advocate the court (Lord Justice-General Clyde, Lords Carmont and Sorn: October 4, 1960) varied a sentence of eighteen months' imprisonment by directing that the period of ten weeks from application for leave to appeal to the date of hearing should not count towards sentence. W. had been convicted on five charges of fraud and two of uttering forged money orders involving in all over £250 and the court, although W. only appeared to state his desire to be allowed to abandon, considered the appeal to be frivolous and an abuse of procedure, and marked their disapproval by forfeiting the period pending hearing of the appeal.

Theft by opening lockfast places

In PATTERSON *v.* H.M. ADVOCATE the court (Lord Justice-General Clyde, Lords Carmont and Sorn: October 4, 1960) varied a sentence of eighteen months' imprisonment by substituting two years. P. aged 20 had pleaded guilty for forcing entry to a lockfast omnibus, stealing 70 cigarettes, a box of chewing gum and £6 2s. of money. P. had four similar convictions and one for assault and robbery. P. stated his desire to abandon the appeal but the court thought his sentence too lenient and took the opportunity to adjust it.

Assault and robbery

In LITTLE *v.* H.M. ADVOCATE the court (Lord Justice-Clerk Thomson, Lords Mackintosh and Strachan: January 10, 1961) refused to vary a sentence of two years' imprisonment imposed upon L., a youth aged 16 with no relevant convictions who was convicted along with two others of assaulting a man in the street, beating him with their fists, knocking him down and robbing him of £2. The court obtained a probation report which disclosed that L. was in fact not a first offender and was unsuitable for probation.

Culpable homicide

In BOYNE *v.* H.M. ADVOCATE the court (Lord Justice-Clerk Thomson, Lords Mackintosh and Strachan: January 10, 1961) refused to interfere with a sentence of fifteen years' imprisonment imposed upon a 25-year-old epileptic charged with murder whose special defence of insanity resulted in a verdict of guilty of culpable homicide. The court was unimpressed with the argument that had he pleaded guilty to murder B.'s sentence would hardly have exceeded ten years, and refused to consider the degree of diminished responsibility as reducing culpability following *Kirkwood* v. *H.M. Advocate*, 1939 J.C. 36. See also *McCrorie* [1960] Crim. L.R. 839.

Acts and Orders*

Animals

The 1960 Order (S.I. 1960, No. 1721) is revoked and re-enacted with amendments, the principal of which is that the U.S.S.R. is removed from the list of countries believed to be affected with

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* Prepared by F. Maurice Drake, Barrister-at-Law.

African horse sickness, from which the importation of horses was prohibited by the Order of 1960. It is also provided that in the case of a horse imported from a country not on such list the veterinary certificate which under the Importation of Horses, Asses and Mules Order, 1957 (S.I. 1957, No. 467) must accompany the horse, shall include a statement that African horse sickness has not existed in such country for at least twelve months. Operative February 22, 1961. IMPORTATION OF HORSES, ASSES AND MULES (AFRICAN HORSE SICKNESS) (PROHIBITION) ORDER, 1961 (S.I. No. 260) (3d.).

For penalties for contraventions, see section 7 of the Diseases of Animals Act, 1950.

The principal Order (S.I. 1954, No. 853) is amended so as to make it illegal to land in Great Britain dry sausage (salami), fully cured bacon and ham, and sausage casings (cleaned and scraped), originating in Spain and Portugal, without a licence. Operative March 4, 1961. IMPORTATION OF CARCASES AND ANIMAL PRODUCTS (AMENDMENT) ORDER, 1961 (S.I. No. 329) (3d.).

For penalties for contraventions, see section 7 of the Diseases of Animals Act, 1950.

Any person who at any time commits an offence under the Protection of Birds Act, 1954, in respect of a bird included in Part I of the First Schedule to the Act or in respect of the nest or egg of such bird is liable to special penalties. This Order adds the collared dove to Part I of the First Schedule as regards England and Wales. Operative April 15, 1961. WILD BIRDS (COLLARED DOVES) ORDER, 1961 (S.I. No. 470) (2d.).

A bird sanctuary is created in the part of Lincolnshire prescribed in the Schedule to this Order, and the acts specified in articles 2 and 3 (relating to the killing or harming of birds and the taking or harming of eggs) are made specified offences under the Protection of Birds Act, 1954. Under article 4 these offences will be punishable by the special penalty provided in the Act for the more serious offences thereunder. Operative March 1, 1961. WILD BIRDS (GIBRALTAR POINT SANCTUARY) ORDER, 1961 (S.I. No. 293) (3d.).

For penalties for contraventions, see section 12 (2) of the Protection of Birds Act, 1954.

Betting and Gaming

See under **Scotland,** below, p. 336.

Civil Aviation

Aircraft are prohibited from flying below 2,000 feet above the Royal Naval Propellant Factory at Caerwent and within a circle of $1\frac{1}{4}$ nautical miles' radius of that factory. Operative March 1, 1961. AIR NAVIGATION (RESTRICTION OF FLYING) CAERWENT ROYAL NAVAL PROPELLANT FACTORY) REGULATIONS, 1961 (S.I. No. 247) (2d.).

For penalties for contraventions, see article 57 of the Air Navigation Order, 1960 (S.I. 1960/972).

Criminal Procedure

Section 1 of the Road Traffic and Roads Improvement Act, 1960 (which relates to the fixed penalty procedure), is extended to the City of London, the City of Leicester and the County Borough of Blackpool. Operative March 1, 1961. FIXED PENALTY (AREAS) ORDER, 1961 (S.I. No. 266) (2d.).

Dangerous Drugs

By Regulations 2, 6 and 7 of these Regulations and the Schedule thereto the drugs acetyldihydrocodeine and propoxyphene cease to be subject to the control imposed by Part II of the Dangerous Drugs Regulations, 1953, and are instead made subject to the less strict control under Part III which provides that the control of sale and distribution applies only in the case of wholesale dealers, and does not prohibit the possession of any drug in a quantity not exceeding one pound. By Regulation 4 an agent acting in the transfer of a business and its stock-in-trade will not, merely because the stock includes drugs controlled under the Regulations, require a licence on the ground that he is procuring or offering to procure the drug for another person. The remaining Regulations (1, 3 and 5) and the Fifth Schedule make no changes in the control of the drugs named. Operative March 1, 1961. DANGEROUS DRUGS REGULATIONS, 1961 (S.I. No. 277) (3d.).

For penalties for contraventions, see section 15 of the Dangerous Drugs Act, 1951.

Exchange Control

The First Schedule to the Exchange Control Act, 1947, specified the territories which were to be " scheduled territories " for the purposes of that Act. The Schedule has frequently been amended and this Order now sets out the First Schedule in a consolidated form. Operative February 28, 1961. EXCHANGE CONTROL (SCHEDULED TERRITORIES) ORDER, 1961 (S.I. No. 276) (3d.).

Food and Drugs

Regulations applying to England and Wales and Scotland respectively, amend the principal Order (S.I. 1953/536) so that (a) on and after March 20, 1962, wines obtained by the fermentation, elsewhere than in their district of origin, of the juice of grapes but no other fruit, which wines have not been subject to any process so as to alter their character, are exempted from the requirement to declare on the label the fruit basis and alcohol content and (b) it is permitted, in the meantime, to label intoxicating liquor in accordance with the provisions of the principal Order as previously amended or as amended by these Regulations. LABELLING OF FOOD (AMENDMENT) and (SCOTLAND) (AMENDMENT) REGULATIONS, 1961 (S.I. Nos. 440, 469) (each 3d.).

The Regulations of 1960 (S.I. 1960/1411) are revoked and re-enacted so as to prescribe further qualifications for officers who may be appointed by councils to act as meat inspectors under the Food and Drugs Act, 1955.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 265 (Southwark) (2d.); 271 (Ealing) (3d.); 272 (Finsbury and Shoreditch) (3d.); 289 (City of London) (2d.); 320 (Staines) (2d.); 330 (Dartford) (3d.); 348 (Bermondsey) (2d.); 349 (Swanscombe) (3d.); 425 and 426 (St. Pancras) (each 2d.).

The following Orders have been made prohibiting cycling on footpaths: S.I. Nos. 253 (Swanscombe) (3d.); 360 (Dartford) (3d.).

The following Order has been made prohibiting waiting: S.I. No. 315 (Grays) (3d.).

Throgmorton Street in the City of London has become subject to an Order the effect of which is to prohibit all traffic from using that street between the hours of 11 a.m. and 4 p.m. on Mondays to Fridays inclusive save for the purpose of conveying persons or goods to or from premises in that street or in connection with certain specified constructional demolition and building operations. Operative March 1, 1961. LONDON TRAFFIC (PROHIBITION OF TRAFFIC) (CITY OF LONDON) REGULATIONS, 1961 (S.I. No. 288) (2d.).

For penalties for contraventions, see Regulation 4 of these Regulations.

The London Traffic (40 m.p.h. Speed Limit) (No. 1) Regulations, 1958 (S.I. 1958/301), are amended so as to apply a speed limit of 40 m.p.h. on a shorter length of The Common at Stanmore. Operative March 19, 1961. LONDON TRAFFIC (40 M.P.H. SPEED LIMIT) (AMENDMENT) REGULATONS, 1961 (S.I. No. 412 (2d.).

Amendments are made to the London (Waiting and Loading) (Temporary Restriction) Regulations, 1960 (S.I. 1960/2109) in respect of certain streets or lengths of streets in the City of Westminster, Holborn, St. Marylebone, and St. Pancras. In Holborn, St. Marylebone and St. Pancras certain streets are removed from the operation of the Regulations, but other restrictions as to loading, unloading and waiting have effect by virtue of the LONDON PARKING ZONES (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) REGULATIONS, 1961 (S.I. No. 422) (1s. 3d.), or the Parking Places (St. Pancras) (No. 1) Order, 1960 (S.I. 1960/2322). LONDON (WAITING AND LOADING) (TEMPORARY RESTRICTION) (AMENDMENT) REGULATIONS, 1961 (S.I. No. 435) (6d.).

Merchant Shipping

The principal Regulations (S.I. 1953, No. 1036) are amended to provide that hospitals of ships regularly engaged on voyages to areas within the Persian Gulf shall be provided with a means of air conditioning. Operative May 1, 1961. MERCHANT SHIPPING (CREW ACCOMMODATION) (AMENDMENT) REGULATIONS, 1961 (S.I. No. 393) (2d.).

For penalties for contraventions, see section 1 of the Merchant Shipping Act, 1948.

On the application of the Urban District Councils of The Lakes and Windermere, these Rules have been made concerning the lights and signals to be carried and the steps for avoiding collision to be taken by vessels navigating Lake Windermere. Operative March 20, 1961. LAKE WINDERMERE (COLLISION RULES) ORDER, 1961 (S.I. No. 343) (4d.).

For penalties for contraventions, see section 680 of the Merchant Shipping Act, 1894.

Road Traffic

The following sections of the Road Traffic and Roads Improvement Act, 1960, came into operation on March 20, 1961: section 11 (miscellaneous amendments as to local authorities' parking places and traffic schemes) and subsections (1) to (7) and (9) and (10) of section 13 (additional powers of local authorities in connection with provision of off-street parking places). ROAD TRAFFIC AND ROADS IMPROVEMENT ACT, 1960 (COMMENCEMENT NO. 2) ORDER, 1961 (S.I. No. 327) (2d.).

By Orders made under the Road Traffic Act, 1956, parking places with parking meters are to be provided in Bristol and Manchester. The location of these parking places is described in the Schedules to the Orders, which also provide for the times and days during which the parking places are to be in operation, the types of vehicles which may be parked there, and the charges which the City authorities are empowered to make and the general method of operating the scheme. Operative for all preliminary purposes to enable the Councils to acquire the sites and carry out works in Bristol February 25, and Manchester February 21, and for all other purposes in Bristol March 13, and Manchester May 1. PARKING PLACES (BRISTOL) (No. 1), (MANCHESTER) (No. 1) ORDERS, 1961 (S.I. Nos. 264 (9d.) and 249 (1s. 3d.), respectively).

For penalties for contraventions, see section 22 of the Road Traffic Act, 1956.

Scotland

The Police (Scotland) Regulations, 1956 (S.I. 1956, No. 1999) are amended to provide for increased scales of pay and increased rates of detective duty allowance for sergeants and inspectors. The rates payable to constables were specified in earlier Regulations (S.I. 1960, No. 2404) which are consolidated with these Regulations. Operative February 25, 1961. POLICE (SCOTLAND) AMENDMENT REGULATIONS, 1961 (S.I. No. 275) (3d.).

Regulations have been made prescribing the forms to be used in connection with the authorisation and registration of agents by bookmakers and the Racecourse Betting Control Board under section 3 of the Betting and Gaming Act, 1960. Operative June 1, 1961. BETTING (BOOKMAKERS' AGENTS) (SCOTLAND) REGULATIONS, 1961 (S.I. No. 256) (3d.).

Regulations provide for the operation of licensed betting offices. It is provided that licensed betting offices shall be closed between the hours of 6.30 p.m. and 7 a.m. (Reg. 3); as to the display of notices and other written matter and signs on premises giving access to a betting office (Reg. 4); and as to the display of notices and other written matter and signs inside a betting office (Reg. 5). Operative May 1, 1961. BETTING (LICENSED OFFICES) (SCOTLAND) REGULATIONS, 1961 (S.I. No. 257) (3d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

81. *Bench warrants*

Under what authority is a bench warrant issued?

Does it expire when a court of assize or quarter sessions rises?

Is it necessary to quote the authority under which a warrant is issued?

The reason for asking the questions is because at a recent quarter sessions a prisoner on recognisance failed to return next morning for the continuation of the case against him for a simple larceny.

A bench warrant was issued. (In duplicate!!)

The warrant directed that the prisoner be arrested and taken before the quarter sessions court.

It then went on to direct that if the quarter sessions court had risen, the prisoner had to be taken to prison, and the Prison Governor had to receive such prisoner and bring him before the next sitting of quarter sessions (which may be three months' hence).

Therefore, in effect, the Recorder issued a double-edged warrant; that is, a warrant to arrest and take before the court and, as an alternative, a warrant of committal.

My teaching has been that a bench warrant is issued to bring a defaulter before the present sitting of the court, and if there is no arrest before the court rises, the bench warrant is no longer valid.

The next step would be the issue of a certificate of indictment from the clerk of the court. Upon this a justice would issue a warrant of indictment which would enable the police to bring the defaulter before a magistrates' court. This court would hear evidence of defaulting, and commit the defaulter to the next sitting of assizes or quarter sessions (s. 12, Magistrates' Courts Act, 1952).

Therefore, we have a warrant to bring the defaulter before the magistrates' court and another warrant (committal) will be issued after the court appearance to hold the defaulter in prison.

The warrant(s) issued by the Recorder have been the subject of considerable argument, and it is for this reason I ask your views.

It may well be that the matter is one of easy solution, in which case some authority would be appreciated. [A. W. S.]

ANSWER

The only authority for issuing a bench warrant seems to be long standing practice. Different views appear to be taken concerning the period during which the warrant is effective (see Archbold's *Criminal Pleading, etc.*, 34th ed., at pp. 74 and 75). There is no standard precedent for the form of bench warrant and evidently the wording may vary from court to court. The form employed by the County of London Sessions differs considerably from that used in your correspondent's case—notably with regard to the direction to the prison governor to keep the defendant in custody (the London form is silent on the possibility of detention in custody).

It is impossible to give any authoritative opinion on the validity of the form of warrant used in the present case. Modern practice tends to rely on the provisions of section 12 of the Magistrates' Courts Act, 1952, in preference to the bench warrant procedure. But the statute might well be held not to apply to such a case as this. Section 12 applies when " any person does not appear . . . to plead to an indictment. . . ." In the case mentioned, the defendant has, in fact, appeared and pleaded to the indictment.

I do not think that a warrant under section 12 should be issued if a bench warrant is still effective, because that would involve an inferior court in taking action in a matter of which the superior court was already seized. [A. E. J.]

Letters to the Editor

The Police as Prosecuting Officers

Sir,

I have read with interest the letters from Mr. Muir, the Chief Constable of Durham, and Mr. T. C. Williams, the Chief Constable of Huntingdon and the Isle of Ely, which appeared in the March issue of the *Criminal Law Review*.

I do not propose to express any opinion on the vexed question of police officers acting as prosecuting officers, but both Mr. Muir and Mr. Williams in their letters, express opinions about magistrates' clerks which cannot go unchallenged. It would appear that both these gentlemen have come to the following conclusions:

1. That almost all justices' clerks are now full-time, and all fully qualified solicitors.

2. That full-time clerks are more efficient than part-time clerks, who are inexperienced.

I would like to deal with these two questions as follows:

1. It is certainly not true to say that throughout the country almost all clerks are full-time. There are still a great number of part-time clerks. The proportion varies from county to county according to the policy of each Magistrates' Courts Committee. Many counties, including Dorset, have a large proportion of part-time clerks. It is true that practically all part-time clerks are also fully qualified solicitors or barristers, but I know of a number of full-time clerks who are not qualified.

2. I do not know how these two eminent policemen arrive at the conclusion that the full-time clerk must necessarily be more efficient than the part-time clerk. No doubt there are good, bad and indifferent clerks, both full-time and part-time, but there is no evidence to show, and in fact those of us who have experience of appearing before both part-time and full-time clerks will agree, that the part-time clerk is just as efficient and in many ways more experienced, than his full-time counterpart. The reason for this is that a part-time clerk generally also appears as an advocate in other courts, and thereby gets a wide experience of different Benches, whereas the full-time clerk only has experience of his own court.

I feel there can be no justification, when referring to the eleven magistrates' courts in his counties, for Mr. Williams to say "In every case he is just a solicitor in general practice, and they often put in a deputy who has little experience of court work." In fairness to the clerks concerned, I hope Mr. Williams will withdraw this remark.

Your faithfully,

W. P. FARNFIELD,

Magistrates' Clerk.

Sir,

Before you close this correspondence, I hope I may be forgiven for once more returning to a subject which, to judge from the variety of points taken by your correspondents, is one which excites considerable interest in the two professions of the police service and the law.

Some of these points take one a little away, perhaps, from the central theme, though they are none the less interesting for that. Mr. Farnfield, for instance, in his letter in this issue, protests against my suggestion that a full-time clerk can gain an expertise in handling inexperienced prosecution witnesses without giving the impression he is on the side of the prosecution, that is scarcely to be attained by a part-time clerk. I have, of course, no wish to give offence, or in any way to belittle the ability of the part-time clerk in his proper duties. But I would hardly have thought that to supply the deficiencies of the prosecution was one of his duties. In any event, I would have thought it a difficult task, and that the more one does it, the better one becomes at it.

Then, again, Mr. Farnfield asks me to withdraw my remark that, in my counties, where there are no full-time clerks, solicitors in general practice perform these duties, sometimes by deputies. But this I cannot do, because it is the fact. There is surely nothing pejorative about this observation. At any rate, none of the clerks concerned, with whom I have discussed this point, considers that there is anything I should withdraw.

As to the central theme, however, there seems to be little disagreement. I do not, for instance, disagree with the Chief Constable of Durham when, in his persuasive letter in your March issue, he says it is better for police officers not to conduct prosecutions (though I may not agree with some of his reasons). I merely take the view, expressed in " Prosecuting Officer " and in my letter of the same issue, that while the law clearly allows them to do this work, there is no reason why they should not try to do it as well as possible.

The whole thing appears to hinge upon costs. That the key to the problem seems to be in the hands of the lawyers themselves, may be seen from the helpful and practical letter of " Durham Solicitor." The need for a solution is clearly illustrated by the letter of " Another Chief Constable." If some such solution as is urged by the Chief Constable, and suggested by " Durham Solicitor " in practical terms, can be adopted, many Chief Constables would be glad to see their Inspectors relieved of their thankless duties in court and free to do the work for which they are trained. Mr. Napley suggests that what can be done in Durham can be done elsewhere. No doubt " Another Chief Constable " would be delighted if this were so. His bill of costs for £23 12s. 6d. for three straightforward traffic cases, in two of which there were guilty pleas, would have been cut down to a mere £4 14s. 6d., an amount which no Chief Constable or police authority would regard as excessive.

One last point. Mr. Napley writes as the President of the London (Criminal Courts) Solicitors' Association. It would be unreasonable, therefore, to expect him to be unduly lavish with praise for the standards displayed by police officers who conduct as part of their duty prosecutions which his Association regard as requiring the professional services of its members. I do feel, however, that it would be only fair to the many hundreds of capable police officers who discharge these thankless duties so creditably, to assure them that, in the writer's considerable experience, he has yet to meet a Chief Constable, a magistrate, a clerk, a barrister or a solicitor, who shares Mr. Napley's unhappily expressed opinion of their efforts, knowledge and abilities, or who would dream of using such terms as " worthless " in speaking of them.

Yours faithfully,

T. C. Williams,

Barrister-at-Law,

Chief Constable of Huntingdonshire and the Isle of Ely.

R. v. Caslin

Sir,

I am a subscriber to *The Criminal Law Review.* May I, with great respect to your learned commentator, raise a query about *R.* v. *Caslin* (1960), [1961] Crim.L.R. 117

At the top of p. 119, Prof. J. C. Smith states that had the only representations in this case been promises as to the future, the crime would have been obtaining credit by fraud, contrary to section 13 (1), Debtors Act, 1869, in a manner similar to *R.* v. *Ingram* (1956).

I have long thought, relying perhaps on an over-simplified view of *R.* v. *Leon* (1945)[1] that the debt—or liability—must for this offence be "actionable" and that this excluded, not only debts declared void by section 18 of the Gaming Act, 1845, but any other debt or liability arising out of an illegal or immoral transaction, because they would not be enforceable in the civil courts.

Whilst, as a police officer, I know exceedingly little about civil courts, I find it hard to think that the American Sergeant in this case would have been able to persuade even the worldly-wise Westminster County Court either to recover his money, or obtain the services he was seeking.

I would be very grateful if you would enlighten me on this point.

Yours faithfully,

E. LANSDELL.

[Professor J. C. Smith writes: I am grateful to your correspondent for drawing my attention to this point which I had overlooked. It is quite clear that the rule laid down in *R.* v. *Leon* is not confined to debts declared void by section 18 of the Gaming Act, 1845, but extends to other debts which are void or illegal by statute or at common law. So a debt incurred under a credit sale agreement which contravened the Hire-Purchase and Credit Sale Agreements (Control) Order, 1957, was held to be incapable of founding a charge under section 13 of the Debtors Act, 1869: *R.* v. *Garlick* (1958) 42 Cr.App.R. 141. There can be no doubt that the transaction entered into in *R.* v. *Caslin* was void at common law and that no action would lie at the suit of the sergeant to recover the money he had paid: *Taylor* v. *Chester* (1869) L.R. 4 Q.B. 309. No case could, therefore, be made out under section 13. The result is that, in such circumstances, no crime whatever is committed unless the court is able to discern a misrepresentation as to a matter of fact. Thus, there is an unfortunate gap in the law. The court in *Garlick* quashed the conviction "with considerable reluctance because there was abundant evidence that the appellant was guilty of dishonest and fraudulent conduct." Such cases may not be common but it is unsatisfactory that they should occur at all, and this is a situation which ought to be rectified when the long overdue revision of the law of larceny and related crimes takes place.]

Books and Periodicals

Book reviews:

Restitution to Victims of Crime. By Dr. Stephen Schafer. The Library of Criminology, No. 2. London: Stevens & Sons, Ltd. 1960. ix and 130 pp. 25s.

This subject has been given prominence in England as the result of Margery Fry's call for compensation to the victim or victim's relatives as the result of violent crimes. It has been brought to the lawyers' attention by questions in the House and private members' Bills.

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[1] [1945] K.B. 136.

Margery Fry was, it would appear, mainly concerned with justice for the victims. At the outset, a decision must be taken as to the primary principle to be pursued: justice for the victim or the need for an obligation to be laid upon the criminal. The expiation and reformation of the criminal in this latter connection, save as an ancillary benefit, is a difficult proposition to reason, quite apart from the problem of extracting the necessary restitution from him, for example, by deductions from an economic wage provided from work in prison or his wages after release. On the other hand, the victim's compensation could be dealt with on the basis of an insurance scheme, which would leave the punitive-reformative element of restitution out of account.

Dr. Schafer is of Continental background and provides a useful commentary on the deliberations of international bodies on the subject of restitution. The precise word to be used is carefully considered (p. 101) but, as Margery Fry observed: " to the offender's pocket it makes no difference whether what he has to pay is fine, costs or compensation." To the victim or victim's relatives the precise word used would be important merely in relation to the measure of " damages." It is logical to follow Sutherland who, in relation to the fine, observed that " it is rather absurd, that the State undertakes to protect the public against crime and then, when a loss occurs, takes the entire payment and offers no effective remedy to the individual " (p. 118). However, the provision of an effective remedy is fraught with difficulties. Dr. Schafer suggests a system of restitution in respect of all crimes on the final pages of the book (pp. 128–129).

This book is virtually in three parts: the first and the last dealing with the historical and theoretical nature of restitution, together with practical suggestions. The central part, which comprises the body of the book, consists of an outline of methods used by other countries. The latter information is based on a questionnaire (p. 130, Appendix) submitted by the author, who incorporates the results respecting the countries whose legal systems were considered to be the most relevant. The French system is perhaps best known in this country, particularly since some publicity was recently given in newspapers to wages paid to prisoners in that country. The comment on the English law seems inadequate, the Criminal Justice Act, 1948, s. 11, being the only restitutional device referred to. It is often said in this country that the immediate problem and the one that presents the most difficulties for solution, in connection with compensation, is that of personal violence. Perhaps Dr. Schafer was thinking of this aspect only when he refers to the Criminal Justice Act, 1948; but the context by no means makes this clear.

Finally, despite his recommendations, the author does not leave the reader with any conviction respecting the enforcement of payments by the criminal, though he is clear that the restitution order should be part of the function of the criminal court.

T. E. James.

Wilshere's Criminal Procedure. 4th ed. By H. A. Palmer, M.A., and Henry Palmer, M.A., Barristers-at-Law. London: Sweet & Maxwell, Ltd. 1961. xxxii and 338 pp. (including Appendix and Index). 30s. net.

The editors have made a thoroughly good job of bringing up to date *Wilshere's Criminal Procedure*, the new edition being admirable both in content and layout. A special welcome is due to those chapters which are entirely new, in particular the three which deal with Punishments and Orders. Here is a subject far too long neglected in works on the criminal law, and one that has genuine need of being coherently summarised. Apart from magistrates' clerks, who seem to have an astonishing capacity for mastering this aspect of the law, there cannot be many lawyers who have not at some stage experienced difficulty and embarrassment in trying to find the right punishment or the relevant order. These matters are here so neatly set out as to prove a blessing for many a practitioner as well as for the students for whom this book is primarily intended.

Where the overall achievement is so considerable one does not want to cavil at those few small blemishes which seem due primarily to a failure to keep pace with statute law. The Solicitors Act of 1932, for example, has now been largely superseded by the 1957 Act. The absence of the Road Traffic Act, 1960, and other more recent legislation is more understandable. One has to recognise that one of the constant difficulties facing editors of legal textbooks is that the changing law often moves faster than the ordinary process of editing and publishing. Changes in actual procedure, however, have not been great since 1954, the year of the last edition, and they are fully incorporated into the text. From a practical point of view the most important of these changes is the new proceeding under the Magistrates' Courts Act, 1957, whereby an accused person required to appear before a court of summary jurisdiction may in certain circumstances plead guilty in writing without actually appearing.

From the foregoing it will be seen that this book remains what it has always been, the student's leading textbook on the law of criminal procedure.

KENNETH RICHARDSON.

Books received:

Essays in Law. Edited by T. K. Tope. Published by T. K. Tope, Principal, Government Law College, Bombay, on behalf of the Government Law College Students' Union, Bombay. 1960. 94 pp. Rs. 5.00.

Les principaux aspects de la politique criminelle moderne. Collection of papers in honour of the memory of Professor Henri Donnedieu de Vabres. Published under the auspices of the Centre Français de Droit Comparé in collaboration with the Centre National de la Recherche Scientifique. Paris. 1960. xi and 255 pp. No price stated.

Oxford Essays in Jurisprudence. Edited by A. G. Guest. Oxford University Press. 1961. xviii and 292 pp. (including index). 25s. net.

The Probation Officer Investigates. By Paul W. Keve. Minnesota University Press. London: Oxford University Press. 1961. viii and 178 pp. (including appendix, bibliography and index). 36s. net.

The Murder of Sir Harry Oakes, Bt. Published by The Nassau Daily Tribune. 1959. viii and 481 pp. 25s. net.

Life, Death and the Law. By Norman St. John-Stevas. London: Eyre and Spottiswoode (Publishers), Ltd. 1961. 375 pp. (including appendices and index). 35s. net.

Essays in Criminal Science. Edited by Gerhard O. W. Mueller. New Jersey, U.S.A.: Fred B. Rothman & Co.; London: Sweet & Maxwell, Ltd. 1961. xvi and 460 pp. 70s. net.

Manuel de police scientifique. By Jean Gayet. Paris: Payot. 1961. 464 pp. and 23 diagrams. 31,000 NF.

Readers' digest:

Arrest: Arrest without warrant: 111 *Law Journal* 184.

Evidence: Character: 105 *Solicitors' Journal* 206 and 294.

Fraud: The meaning of recklessness (concerned with recent decisions on s. 13 (1) of the Prevention of Fraud (Investment) Act, 1958): 111 *Law Journal* 166.

Law Reform: Criminal Justice Bill in Committee: 125 *Justice of the Peace* 143.

Magistrates' courts: procedure: Pleading guilty by post: 125 *Justice of the Peace* 160.

Magistrates' courts: procedure: Guilty pleas under the Magistrates' Courts Act, 1957: 125 *Justice of the Peace* 187.

Magistrates' courts: procedure: Prosecutions by police in the magistrates' court: 125 *Justice of the Peace* 142.

Mental health: The Mental Health Act, 1959: 17 *The Magistrate* 36.

Road traffic: On leave (based on *Strong* v. *Dawtry*, above, p. 319): 125 *Justice of the Peace* 168.

Sentence: The sentence of the court: 125 *Justice of the Peace* 173.

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1961

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.*4. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

June 1961

Criminal law and public opinion

In this special issue we publish five articles written around this theme. Mr. Silvey has, in the first article, collected some of the results of research into public opinion carried out on behalf of the B.B.C. Whilst no positive conclusions can be drawn from these results, certain popular misconceptions are displayed and these have made the starting point for the views expressed in the succeeding articles.

Our contributors have not expressed uniform opinions; they have written from their own differing points of view and these are not to be taken as representing the official views of the professions or organisations to which they belong.

In their daily affairs the public come in contact more with the police than with any other professional body concerned with the enforcement of the criminal law. It follows therefore that the public's attitude to the criminal law is to a large extent governed by its opinion of the police, and whether the impression given by the police is good or bad is determined not only by their own behaviour but also by two important factors over which they have no control. First, the law which has to be enforced should be clearly drafted and, to put it no higher, should have some real basis in popular opinion and not merely popular opinion as stated by politicians. Secondly, it is essential that legal procedures should assist the enforcement of the law and not stultify it by a superfluity of technicalities in the administration of the law. Mr. Napley has drawn attention to some of the practical grievances expressed by members of the public who come into contact with the courts. With regard to the first of these two factors, all the contributors have thrown light on a complex and delicate problem—the relationship between the content of the law and the opinion of the society in which that law is administered.

Public opinion and capital punishment for murder

In connection with the views expressed by Dr. Bolt in his article "Public Opinion and Law Reform"[1] on the possible value of a referendum on a particular issue, it is interesting to note the replies given by the Home Secretary in the House of Commons recently. Mr. F. Harris asked him if he would arrange a referendum to ascertain public opinion regarding a revision of the Homicide Act, 1957, to permit the full restoration of capital punishment for murder.[2] Mr. Butler replied that the referendum is not part of our constitutional practice. He would rather the House expressed its opinion than that a referendum be held, and he advised Mr. Harris "to adhere to the processes of Parliament."

Testing the drinking driver

The Council and Members of the Association of Police Surgeons of Great Britain, at their annual conference held this year at Keswick, Cumberland, fully discussed sections 1 and 2 of the Road Traffic Bill, 1961.

It was unanimously agreed that, being conscious of their responsibilities to the general public and to the individual, they should support the Minister in his efforts to secure greater safety on our roads.

Since the Bill as proposed does not define impairment of ability to drive properly, medical evidence based on clinical examination must be an essential part of the investigation, even though chemical tests may become obligatory under the Bill.

Withdrawal of blood for the purpose of estimating the concentration of alcohol in the tissues is undesirable. Specimens of urine serve equally well and may be obtained without risk.

The taking of specimens for scientific investigation must be the responsibility of the examining doctor.

Procedures for analysing the concentration of alcohol in the tissues from samples of urine should be standardised for the purpose of the Bill.

In addition to being qualified under the Bill, analysts should also be sufficiently experienced in the standard procedures adopted before their results are accepted by the courts.

It was further agreed that apparatus at present available for examination of the breath for estimation of the alcohol content is complex, and its results are not sufficiently reliable to be acceptable by a court.

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[1] Below, p. 385, at p. 392.

[2] H.C. Deb., Vol. 638, cols. 1356–1357.

An experiment worth trying

In recent months Sir Basil Henriques, supported by an impressive body of informed and expert opinion, has campaigned for the introduction in this country of a scheme of training for young offenders similar to that operating at the Boston Training Centre in Massachusetts.

The essence of the method is attendance during leisure hours at a training centre, not for a total of a mere twelve or twenty-four hours and not merely weekly, but several times a week over an extended period. The training, which would be long enough to be individual and constructive, would be associated with probation, which at the end of the period would be continued or discharged or replaced by residential training according to the progress made. Many advantages are claimed for this method of training, including inexpensiveness, reduction in the risk of contamination, relief of overcrowded institutions, the possibility of personal attention for the individual, training in the context of the whole-life situation, and at least a temporary removal of the youngster from the influence of other dangerous leisure environments.

Two impressive arguments of a less specific kind have been advanced in favour of an experiment along these lines. One is the Boston experience of a very fair measure of successful training: we cannot deserve to succeed in our fight against delinquency unless we are willing to benefit from the teaching of other countries. The other is simply the manifest need, in the present situation of juvenile crime, for bold experiment; there is no clear reason why an experiment that would be cheap and probably readily organised should not be given a trial.

The Government have intimated that they were sympathetic to the proposal, and Lord Hailsham hinted at a possible amendment to the Criminal Justice Bill.[3]

A year and a day

The death was reported recently of a girl who had lain unconscious for nearly fourteen months after a road accident. This prompts reflection on the requirement in the definitions of murder and manslaughter that the death occur within a year and a day after the infliction of the injury. What if the driving which causes a much delayed death is bad enough for a jury to call it manslaughter if asked (and permitted) to do so? What should be the modern rule applying to a death which directly results, but over a year later, from a murderous attack with an iron bar?

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[3] *The Times*, May 17, 1961.

The "year and a day" rule was originally justified by (in Kenny's words) "the defectiveness of medical science in medieval days." But nowadays the necessary link between the criminal act and the delayed death may be capable of being proved by evidence which would not have been available, and would not in any case have satisfied a jury, even in the days of Hawkins and East who state the rule. And it is precisely as a result of medical skills unknown to our ancestors that death may now be more often delayed beyond the year. We wonder whether there can be any justification for the continued existence[4] of a period of limitation deriving from the evidential problems of centuries ago.

Judicial appointments

Mr. Herbert Bewick has been appointed Recorder of Pontefract.

Mr. Arthur Brian Boyle, C.B.E., Q.C., has been appointed Recorder of Newcastle-upon-Tyne. Mr. Boyle has relinquished his Recordership of Sunderland.

Mr. John Francis Scott Cobb has been appointed Recorder of Doncaster.

Mr. Edward Walter Eveleigh, Q.C., has been appointed Recorder of Burton-on-Trent.

Mr. Rupert Rawden Rawden-Smith has been appointed Recorder of Sunderland.

Mr. Charles William Stanley Rees, T.D., Q.C., has been appointed Recorder of Croydon.

Mr. Charles Raymond Dean has been appointed Deputy Chairman of West Riding Quarter Sessions.

Mr. Edward Lucas Gardner, Q.C., has been appointed Deputy Chairman of East Kent Quarter Sessions.

Mr. Geoffrey Dawson Lane, A.F.C., has been appointed Deputy Chairman of Lincoln Quarter Sessions (Parts of Lindsey).

Mr. Henry Gaunt Suddards has been appointed Deputy Chairman of West Riding Quarter Sessions.

Mr. Donaldson Loudoun has been appointed a Metropolitan Stipendiary Magistrate.

Mr. David Powys Rowland has been appointed a Stipendiary Magistrate at Merthyr Tydfil.

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[4] See *R.* v. *Dyson* [1908] 2 K.B. 454.

The Criminal Law and Public Opinion

By JONATHAN SILVEY *

It is generally agreed that for law to be regarded as *good law*, it must be based upon two qualities. It must in some sense represent the social consensus or sovereign will about what is or is not desirable in society. It must also be *rational*, in the sense that it is internally consistent with itself and hence predictable. That is, it must be sufficiently logical for a body of case-law and interpretations to be built up which are, by and large, independent of the lawyers interpreting it. Without the former quality, the law is undemocratic, and will command neither loyalty nor the respect which is essential to its functioning. Without the latter, it merely becomes a system of arbitration, and every dispute would necessarily be settled in court. The authority of the law is derived from the appeal to these qualities, " sovereign will " and " reason," imprecise though they may be.

Sir Robert Peel defined public opinion as " that great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy, and newspaper paragraphs." This confused mixture of wrongheadedness, good sense, and ephemerality is perhaps one reason why political scientists have been reluctant to equate public opinion with social consensus. Although law partially derives its authority from this compound, it cannot both reflect public opinion faithfully and still retain its second intrinsic quality of rationality. Nevertheless, the law relies upon respect and general agreement to be effective. If public opinion does not hold that a particular type of behaviour is objectionable and a matter for legal interference, police will be reluctant to prosecute, juries will not convict, judges will pass only token sentences.

To the sociologist, law is only one of various institutions exercising a form of social control. As such its efficiency is affected by public opinion both in its making and in its operation. Both those who make law and those who administer it must be continuously aware of its impact upon society. As Mr. Justice Holmes put it, " The life of the law has not been logic; it has been experience." Knowledge of results is a prerequisite for improvement and efficiency in any system which has a function to perform.

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* Mr. Silvey is a member of the staff of the Home Office Research Unit, but the views expressed in the article are entirely his own.

Criminal law in a changing society

In the field of criminal law and the punishment of offenders, the law's function sociologically is to prevent certain actions which the community has condemned. It can, however, only function within certain limits prescribed by society. Children are not sent to prison for life, whatever their actions. Sunday trading, although a statutory offence, is rarely prosecuted. Public opinion would support neither such action on behalf of the law. But it is not so long since both these now-intolerable occurrences were commonplace.[1] The rapid social, economic and scientific developments of today bring with them new ideas of the boundaries between crime and sin, free-will and compulsion. In a dynamic society, many voices will be heard urging changes in this direction and that. The law is no exception, and cannot retain its position by remaining static in a changing society.

But which way to move? Many claims are heard daily. Letters to editors are written, speeches are made, resolutions passed, pressure groups organised. Yet law is action taken on behalf of the whole community and not merely of those with the loudest voices. Today sophisticated techniques of social surveys are being developed and used in a wide variety of fields to predict accurately mass behaviour in real and hypothetical situations. Could they be of assistance to those concerned with the law?

The value of public opinion polls

One of the commonest criticisms of public opinion polls as guides to the legislator is that they bind him to artificially prescribed courses of action. Extravagant claims made by pollsters with little understanding of political theory have to some extent been responsible for this. But the uses to which scientific instruments of any sort are put are not the prerogative of the technicians who construct them. Nor should the tools themselves be blamed if they are mishandled. Pollsters, but not polls, are to blame for the superficiality of many of their findings. For the purpose of this article, we are not so much interested in the popular solution for any current problem as in the underlying attitudes which determine the choice of this or that solution.

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[1] In 1959 there were 302 such convictions compared with an annual average of 21,711 in the 1930s. While the volume of Sunday trading has probably declined in this period, it is most unlikely that this accounts for the enormous fall in convictions.

In the field of attitudes to law and punishment, various polls have gained much publicity recently for the high degree of unanimity they report about the solutions to current issues.[2] Can this agreement be taken as expressing the social consensus which should be written permanently into the structure of the law? The light in which such findings would be authoritatively interpreted was clearly stated by the Attorney-General in the House of Commons. " In deciding to what extent effect should be given to the manifestations of public opinion, I think one must try to ascertain to what extent that public opinion is well informed and instructed. . . . That poll (a *Daily Telegraph* poll on capital punishment, supported by 68 per cent. of those questioned) made it quite clear that the anxiety of the public in regard to this matter is based almost entirely on reasons which were unanimously rejected in this House as being invalid and irrelevant."[3]

In other words, although public opinion and the social consensus may overlap, they are not synonymous. The problem is to identify that element in the public opinion, common to both, which is relatively stable and which will provide the clue to the direction in which society wishes to develop. In his day, Dicey referred to " opinion which has told on the course of legislation " as " law-making or legislative opinion."[4] With the development of modern social science techniques, there are perhaps two new methods by which " legislative public opinion " might be reached and identified.

" Legislative public opinion "

The first is social surveys aimed specifically at the public's relatively enduring attitudes, rather than its glib solutions to and opinions about, current issues. The man in the street is unlikely to have any considered basis for evaluating a problem with which he was largely unfamiliar until faced with an interviewer on his doorstep. Yet the ease with which he gives an opinion on most subjects suggests that there must be some underpinnings or precursors of an opinion waiting to be tapped. Such an attempt would require more resources, and certainly more careful interpretation, than most polls usually demand. Intrinsically, however, there is no difference between an inquiry into the deeper attitudes to law, punishment, and deviant behaviour, than into the deeper motives for buying fish, detergents or cigarettes.

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[2] For example, Social Surveys (Gallup Poll), Ltd., March 1960: 78 per cent. of the general population advocate capital punishment, 74 per cent. corporal punishment. B.B.C. Audience Research Department, June 1960: 83 per cent. advocate corporal punishment.

[3] H.C. Debates, Vol. 453, col. 1424.

[4] A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century*, 2nd ed., 1914.

From a knowledge of the basic, enduring attitudes on which more ephemeral opinions about current topics are founded, the sociologist should be able to predict fairly accurately how the public would react to different courses of legislative action. But the necessary corpus of knowledge could not be built up overnight, it would require a research programme over a number of years to gather the pieces together.

To supplement this knowledge, another method enabling the course of this relatively stable social consensus to be charted and predicted might prove fruitful. From our everyday experience, we know that there are those who lead opinion and those who follow the pace-setters. Who are these opinion leaders? Describing the way in which public opinion influences the legislative programme, Dicey believed that new statutes embodied " the wishes and ideas as to legislation held by . . . the majority of those citizens who have at a given moment taken an effective part in public life." With universal suffrage, such an explanation will not do. On the other hand, neither will its extreme alternative, that law-making opinion corresponds to the opinion held in common by the greatest number of individuals in the community. But if changes in public opinion follow this model of leaders and led (and its validity is attested in both commonsense experience and in sociological investigations), it should be possible to identify those opinion-setters whose attitudes today become the stable sub-stratum of tomorrow's public opinion. Data gathered from past sociological and public opinion studies would enable us to identify empirically those whose opinions yesterday foreshadow today's legislation. It should then be possible to describe the conditions under which significant opinion is translated into legislative action.

The interpretation of polls

There is a sense in which a new law can safely be ahead of public opinion without losing its respect. Sometimes prophecies will alter the course of the events to which they refer, precisely because they have been made explicit. Dicey saw that this self-fulfilling prophecy phenomenon operates in attitudes to the law. " Laws foster or create law-making opinion " as well as being the outcome of public opinion. When a law is enacted, " its underlying principle derives prestige from its mere recognition by Parliament." Social surveys in several countries have confirmed this suggestion.[5]

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[5] See Lazarsfeld, P. F., " Public Opinion and the Classical Tradition," *Public Opinion Quarterly*, XXI, 1957.

Conversely, some of the horror with which certain crimes are regarded by the public may be derived from the severe penalties with which the law has traditionally dealt with them.[6] We shall have more to say about this idea of " natural repugnance " later. Here, we may observe that polls calling for, for example, a particular type of punishment should be interpreted in the light of two factors. First, there are the underlying attitudes determining the particular preference expressed. Second, there is the situation which would exist if action were taken in accordance with, in the Attorney-General's words already quoted, " well-informed and instructed public opinion."

There is, of course, no reliable way of gauging the extent to which public opinion is well-informed other than by a properly conducted social survey. It is common practice in such surveys to sound out how much the sample knows about the topic of investigation as well as their opinions on it. Some examples of just how much (or how little) information the public has to base its beliefs about crime will be quoted from the B.B.C. survey later.

Even with these improved methods of keeping in touch with public thought and its changes, the politician himself has still to decide what action he would prefer to see taken. Where reliable evidence about the probable outcome of a new proposal is rejected, perhaps on emotional grounds by a majority of the public, he is not relieved of the responsibility and necessity for weighing up those counterbalancing forces. The criterion he selects is a matter for comment by his colleagues and the political theorist. The social surveyor's job is merely to supply him with sound evidence about the actual and the likely state of public opinion.

Underlying attitudes revealed by two recent polls

As evidence of the variety of underlying attitudes which may be masked by an apparent unanimity of opinion, let us look at the evidence of two recent British polls. Last year at least three surveys were made of the public's attitude to sentencing. In March Social Surveys (Gallup Poll), Ltd. conducted a survey for the *News Chronicle* of opinions about capital and corporal punishment. In June, the B.B.C. Audience Research Department surveyed public attitudes to crime with a questionnaire which was repeated on a separate sample in September. In each case there were approximately 1,100 informants, representative in their age, social class, and occupation distribution of the general population.

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[6] For example, W. F. Deedes, M.P., suggested in the *Daily Telegraph*, Feb. 1, 1961, that murder is regarded with such general horror partly because the traditional punishment for it has been death.

The finding in each which caught the publicity was that four in every five believed that corporal punishment should be available to the courts. But behind this seeming unanimity, there lurked a variety of attitudes making for this general conclusion—many of them contradictory.

There was, for example, much less agreement about which offences should be subject to it. The Gallup Poll found that 74 per cent. were in favour of corporal punishment, but the highest agreement on the type of offence which merited such treatment was 52 per cent. in favour of it for " robbery with violence on an old lady." Thus, only one offence received a bare majority of support for corporal punishment.

The reasons for advocating it were far from unanimous. Only 35 per cent. of the advocates favoured the automatic imposition of corporal punishment for particular offences, whereas 65 per cent. believe that the courts should " take account of special circumstances such as the age of the man, his upbringing and his mental condition, and be able to give a lesser sentence." Again there is some inconsistency in the advocates' reasons. About 35 per cent. favoured it on the grounds that it would deter others, while another 35 per cent. felt that it was the punishment most suited to the crime. Only 24 per cent. advocate it on grounds that it could prevent recidivism. However, four out of five of the advocates believe that the restoration of corporal punishment would be followed by a reduction in the number of crimes of violence and sexual assaults. It thus appears that a large number of the advocates were unaware of, or had not absorbed, such systematic evidence as there is to suggest that corporal punishment does not lead to either a fall in recidivism or a decline in the number of criminals convicted of offences carrying corporal punishment.

Social psychologists are only too aware that beliefs are rarely held on purely rational grounds. Opinions are especially likely to be independent of evidence in a field so emotionally tinged as crime and punishment, with its socially acceptable projection of unconscious feelings. A greater awareness of facts which point to an alternative course from that already chosen on emotional grounds will lead only occasionally to a change in opinions in order to accommodate these facts coherently. Nevertheless, recent survey findings reveal some unexpected relationships between the emotions aroused by particular crimes and the penalties which are felt appropriate for them.

The B.B.C. gave their informants a list of fifteen offences and asked them which they considered " *the worst* crime, the most serious crime?" The result was surprising, and is worth quoting in full.[7]

Indecent assault on women or children	25 per cent.
Cruelty to children	21 ,, ,,
Planned murder for money	20 ,, ,,
Killing a policeman to escape arrest	9 ,, ,,
Being drunk in charge of a car	6 ,, ,,
Robbery with violence	6 ,, ,,
Rape	6 ,, ,,
Causing death by dangerous driving	6 ,, ,,

The lack of agreement is perhaps the most surprising feature of these results. No offence is uniformly held in such "natural repugnance" as to justify, on these grounds alone, a penalty greater than all others. Sexual offences are regarded as more serious than those which may carry the death penalty. No offence is agreed to be the "most serious" by more than one in four of the sample. Offences involving death were chosen by one in three of the population, and sexual offences by almost that number.

The greatest agreement referred to indecent assault on women and children. Yet when the sample were asked specifically whether such offenders should be severely punished, two-thirds felt that "they should be given medical treatment and advice, rather than punishment alone." It seems that the reparative or retributive element in sentencing is not so predominant as might be expected.

Opinion on the aims of sentencing

What, then, is generally felt to be the first concern of the courts in sentencing a criminal? Justice in the criminal courts is usually said to be a compound of the factors of retribution, deterrence, reformation, and the protection of society. The fairest balance of these four in a given case requires a great deal more than the wisdom of Solomon, whose problem of arriving at the truth was comparatively easy. A knowledge of the relative weight which society in general attaches to each factor would surely be of some assistance to the judge and the magistrate. Both surveys included a single question on this matter, but in such different forms as to prevent any direct comparisons between them.

The B.B.C. asked "What should be the main purpose of sentences?" and received the following answers.

Severe in order to deter others	26 per cent.
To punish the criminal	16 ,, ,,

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[7] Quoted, with permission, from an unpublished B.B.C. Audience Research report on the television series, "Crime."

To protect society	13 per cent.
To reform the criminal	30 „ „
All are equally important	6 „ „
It depends on the offender	11 „ „

The Gallup Poll asked " What should be the first concern of the courts in sentencing a criminal? " and received this distribution of answers.

To punish him to stop others following his example	25 per cent.
To punish him for what he has done to others	36 „ „
To do what they can to reclaim him as a good citizen	32 „ „
Don't know	7 „ „

Both polls agree in showing that nearly one in three put reformation first, and nearly one in four feel that deterrence of others is the crucial aim to to be considered. Support for the preventive and retributive elements seems to depend on the alternative answers with which the informant is faced.

The idea of justice

It thus appears, from the admittedly limited sources of information which are yet available, that the social consensus of opinion about the ends of justice (rather than the specific means to achieve these ends) is sharply divided. To the man on the Clapham omnibus, this may mean little more than that the " British sense of justice " means different things to different Britons. To the social scientist and the lawyer, it should have wider implications.

The " sense of justice " is seen to be fluctuating and intrinsically unstable. It is not a concept to which an appeal can reliably be made, in the hope of obtaining general agreement to a course of action. What is just to one man may be highly unjust to another, depending on the subjective meaning each attaches to the idea of justice.

Justice, we are constantly reminded, must not only be done, but must be seen to be done. Presumably, this is so for two reasons. Potential offenders must learn vicariously that real offenders are punished, and the community has a right to know what is being done in its name.

Does the potential offender know anything about the likely consequences? We have no systematic knowledge, such as social survey techniques could provide, about whether and how knowledge of court actions reaches the public. The high proportion of first offenders among the courts' cases, together with the even higher proportion who are not reconvicted, suggests that this feed-back is not very efficient. " Once only offenders " have presumably learnt a lesson through their own court appearances which they had not learnt from other people's convictions and penalties. More efficient publicity for court convictions and sentences might reduce the volume of crime considerably, if it took into account the actual ways in which news of convictions is spread. If a major deterrent to crime is " what the neighbours would think " of a conviction, why not insert a Public Notice in every local paper, giving a comprehensive list of all convictions of local people during the previous week?

While this information does not at present exist, there are indications of very considerable ignorance about crime among the public.[8] Three-quarters of the population think that, contrary to the published statistics, the proportion of juvenile to the total volume of crime has risen considerably compared with before the war. Only one in five selected minor larceny as the commonest offence from a list in which it was in fact overwhelmingly the most frequent. Less than 2 per cent. had even the haziest idea of the number of people in prison in this country. All these are admittedly peripheral to the supposed deterrent effect's efficiency, but it is not reassuring. We have no knowledge of how far the message of an avowedly deterrent sentence reaches those to whom it is addressed. If it is a function of sentences to deter others, then steps might also be taken (perhaps in the same Public Notice) to provide an overall picture of sentences given, rather than depend on the press reports of only the more interesting cases.

The second reason why justice must be seen to be done was that justice is action taken on behalf of the community, which therefore has the right and duty to keep a watchful eye on its proceedings. It is apparent from these survey findings that court sentences will not be universally applauded as just by all and sundry.

For this reason most of all, the law should keep in touch with the dynamics of public opinion by the best methods available to it. We ought to know very much more about the different senses of justice held by different groups in the community. If sentences are to be adapted to meet the needs of the criminal rather than the demands of the crime, then a judge should at least be aware of the type of justice he is dispensing. He is acting on behalf of the community, and his decision is intended to have specific effects on both the individual before him and the community at large. He ought therefore to know how different sections of the community are likely to react.

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[8] B.B.C. Survey, *op. cit.*

Ideas of what constitutes justice may vary with changes in public opinion, so that there may come a point when new concepts of citizens' rights and duties are accepted as fundamental. To give but two examples: Convictions for certain motoring offences depend not so much upon whether the accused was found guilty of a particular action or not, as upon the jury's opinion as to whether that action was culpable. As more jurors become motorists, their canons of required behaviour may well alter to a point which the law is forced to recognise. In the same way, the notion of moral responsibility is today under pressure from the human sciences, and the limits of responsibility may become more restricted. At what point should such changes be made? We are back to the problem of when and whose public opinion should "tell on the course of legislation."

The role of sociology in the development of the law

Legality is based on both the social consensus and the authority of reason and scholarship. The law will be weakened to the extent that any branch of learning is excluded from its considerations. There is no basic difference between sociological learning derived from the interplay of social theory and empiricism, and the type of analytic thought from which case-law may be developed. The same canons of scholarship apply to each. There can be no rejection of scientifically validated conclusions about man and his institutions, and equally no rejection of potential avenues to further knowledge. No single discipline can advance far without drawing upon all others available.

The social scientist cannot help feeling that there is a more fruitful role for the lawyer than the limited one put forward in a standard text on jurisprudence.[9] "The lawyer in his professional capacity is concerned with the rules that men are expected to observe, *i.e.*, *ought to* observe. . . . Except when he takes part in some action or prosecution, the lawyer is not generally much concerned to know whether or to what extent his rules actually govern the behaviour of the ordinary citizen." This sterile view seems to imply that if the law does in fact control social behaviour efficiently, such a result is purely accidental. Unless the alleged purpose of the criminal law is to be in marked contrast to its apparent effects, the development of the law must be seen as (in Dean Roscoe Pound's words[10]) "a continually more efficacious social engineering."

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[9] Salmond, *Jurisprudence*, 10th ed., 1947, pp. 15–16.

[10] Roscoe Pound, *An Introduction to the Philosophy of Law*, revised edition, 1959, p. 47.

The Criminal Law and Public Opinion

Some Police Reactions

By CHRISTOPHER WILLIAMS *

It was Hume who, in his *Essays*, said: "As force is always on the side of the governed, the governors have nothing to support them but opinion." And this we take to be a fundamental principle of democracy. Police officers are rightly taught that their main strength comes from a favourable public opinion.

Mr. Silvey's illuminating comments on public opinion and the criminal law are therefore very much to the point for the police service today. Public opinion of the law cannot be far separated from the public opinion of those who enforce it. If it is necessary, as he suggests, for the law to keep in touch with "the dynamics of public opinion by the best methods available," it is to be hoped that the police will do likewise. On the whole, however, the police approach is likely to be more empirical than that of the social scientist or the research worker. But their findings need not, on that account, be without value to the workers in other parts of the field. As Mr. Silvey points out, "no discipline can advance far without drawing upon all others available."

It is not to the point here to examine in detail police activities in the field of public opinion. Aware as they are of the need to retain the good opinion of the public, the police take what steps they can to achieve this end. It is enough here merely to indicate three such steps. First, the police try to provide as efficient a service as they can, both in the way of preventing crime and by catching criminals. No police force can long retain the good opinion of the public if it fails to do the job it is paid for. Secondly, they take every opportunity to retain the good will of the well-disposed, both by maintaining a courteous and impartial attitude to all, and also by such public relations activities as lecturing, exhibitions and visits. Thirdly, they exercise discretion in enforcing the law. This discretion, while it is without legal authority, is rarely challenged. (However, there has recently been a tendency on the part of some professional lawyers to think that the decision whether or not to prosecute ought not to be taken by the police, but some independent authority, equivalent to the Procurator Fiscal of Scotland. It may be that some advantages would flow from such a change, but it is equally possible that the relations between police and public would suffer.)

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* Barrister-at-Law, Chief Constable of Huntingdonshire and the Isle of Ely.

But in making efforts such as these, the police do not seriously examine, as Mr. Silvey has done, the nature and dynamics of public opinion. They may be aware of its manifestations and consequences, but not of its sources, at any rate in a scientific way. Hence they cannot really go far in manipulating it. Suggestions have recently been made that the police should employ professional public relations experts. There are, however, inherent difficulties in such a proposal. But it is in this field that Mr. Silvey's article is of the greatest interest to police. What is public opinion? Where is it to be found? What is it worth? Whose business is it to do anything about it?

To answer such questions as these, Mr. Silvey pays particular attention to one method of assessing public opinion, the poll. This, of course, is especially within his own sphere. But how much trust should the police place in this method? It is, after all, more important in the long run to know why people cast their vote for a particular thing, than merely to know what their vote is. Mr. Silvey himself points out the sort of contradiction and inconsistency that is found in many surveys. Police do not work from day to day, planning their policies in the varying light of ephemeral public opinions. At any moment, they are working on attitudes built up over many years. They are, in other words, more concerned with what Mr. Silvey calls the " underpinnings and precursors " of public opinion, than with the glib, ephemeral or emotional reactions to the pollster on the doorstep.

It would seem, therefore, that, after all, the empirical method of cultivating public opinion practised by the police may prove to be the best for their particular purposes. The function of police, and their place in the social and legal structure, are prescribed by law and custom. If police practice does not deteriorate, then, other things being equal, public opinion of the police ought to remain the same. Or, to put it another way, if police performance and attitude remain unchanged, any deterioration in the public opinion of the police must be due to causes external to the police, such as the character of the law itself, or the moral standards of the public.

It is said, however, that the relations between the police and the public are not what they were. It is difficult to assess the truth of this idea ; the mere assertion proves nothing. On the one hand, many experienced and perceptive police officers, judging from their contacts with individual members of the public and with groups of various kinds, say that they cannot detect any significant lessening of the regard and support of the public, especially the more responsible public. After all, though one envies the youthfulness of many of those critics who hark back so longingly to a golden age which they, perhaps did not personally experience, one cannot seriously pretend that in the twenties and thirties the police were so universally popular and admired ; the writer's own experience in London at that time confirms this. And any student of the Victorian social scene will agree that the popular catch-phrase " If you want to know the time, ask a policeman " reflected not so much the confidence of the Victorians in the reliability of the police, as their assumption that any policeman who did not quickly " win " a watch from the pockets of a drunken reveller was unnaturally and abnormally honest, or dull.

On the other hand, there are the constantly repeated assertions, in certain kinds of newspapers especially, that all is not well. Although this sort of suggestion is to some extent supported by the comments of some police officers to the effect that criminals tend increasingly to challenge and defy the authority of the police, and that it becomes harder to get members of the public to discharge their duties in support of law and order, by coming forward with evidence, reporting criminal acts and so on, nevertheless there are great difficulties in the way of accepting these assertions at face value. For instance, if it said that 10 per cent. more people committed larceny in 1960 than in 1959, the figure can be supported by reliable evidence. Furthermore, if one wishes to know the answers to such questions as who committed these crimes, where do they live, how old are they, what evidence supported the charge, who were the witnesses, and so on, all such facts can, with more or less difficulty, be ascertained. But when it is said that more police officers today distort their evidence, or use improper methods of questioning, such questions go unanswered. And of course it is of vital importance to responsible members of the public and to senior police officers alike to know just such details as which police officers do these things, when, where, to whom, who says they do, what is the evidence, and the rest of it. In the Kafka-esque atmosphere of denunciation without proof so engendered, it is hard indeed for a serious-minded person to assess either the worth or the sincerity of the allegations, though their mere repetition is not without its significance, as will be seen later in this article.

It is not, however, the purpose of this article to discuss the truth or otherwise of such statements, but rather to examine briefly some of the factors which may influence public opinion of the police. And the first thing that must be pointed out is the rather obvious one, that a change in the relationship between two bodies may be due to a change in attitude of either body, the other remaining unchanged. It is too often and too glibly assumed that, if the relationship between the police and the public has changed, then that change is due to a deterioration on the part of the police. But there is no evidence that the standard of performance, or the professional attitude of the police is any different from what it was, say, a generation ago—apart, of course, from what may be due to a prolonged undermanning through underpayment. If this is so, then any deterioration may be ascribed to a change in outlook of the public.

It would not, however, be sufficient merely to conclude that any change that may be noticed is due to the evident lowering of the moral sense of the public, though this has obviously been taking place steadily over the past few years. There is too close a connection between public morality and the law which seeks to foster it, for the law itself to be ignored in this connection. Recently, articles and correspondence in the pages of *The Times*, under the title of " Morality and the Law," have made this clear. A leading article on March 20 pointed out that respect for the law and its observance depend largely on its consonance with everyday moral assumptions. If the law outpaces public morality, it loses public respect and support. And so may the police, when they enforce it. Today we have a host of regulatory laws, especially in the field of road traffic, which have none of the moral validity of the laws against murder, theft, rape, treason and so on. Few people, for instance, view breaches of the parking regulations or speed limits as being in any way wicked or shameful.

But even when the law itself does not attract the disrespect of the public, it may be so difficult to enforce adequately or fairly that the result is the same. Mr. St. John-Stevas, writing in *The Times* on March 24, put the point clearly, though in a slightly different connection, when he said: " The test to apply to divide those moral offences which should be punished by the criminal law from those which should not is whether they harmfully affect the common good. If they do not, they should not be justiciable at all. . . . If they do, the case for legal intervention is not finally established, *since the law may not be enforceable, or not enforceable equitably, or may give rise to greater evils than those it is intended to eradicate*." (My italics.) We may turn to the traffic laws again for an illustration. One might guess, for instance, that at this moment, up and down the country many thousands of motorists are exceeding the legal speed limit; yet one cannot imagine that more than a few hundreds are being caught by the police. In other words, the chances of " getting away with it " on the roads are vastly greater than of getting away with, say, a theft, some 50 per cent. of which are cleared up by the police.

Here, then, is a source of trouble between the police and the public which it is not within the power of the police to adjust. On the contrary, it is within the power of government to seek other measures than the traditional instrument of the criminal law in such matters—improved roads, for instance, or rationalisation of the law—and within the power of the public to meet these twentieth-century problems in a more effective manner than is the case at present. If neither the legislature nor the public tackles these problems with all the means at their disposal, it seems likely that the choice will lie between chaos or an immensely increased police force. Some encouraging signs, however, may be detected, that it will not come to that. For instance, the speed limit of 30 m.p.h. is currently being reviewed; while greatly increased sums are being spent on road engineering projects.

The problem nevertheless remains, of a public which seems to have lost much of its moral standard. As *The Times* pointed out in the article already referred to, " shared moral attitudes, the 'public morality,' form an essential bond of society. Dissolve it, and society dissolves." The individual today seems to be influenced less by what he feels other people will think than was formerly the case. In other words, the " public morality " is less commonly shared, and so less influential, than in the past. There can be no other explanation for the undoubted increase in criminality and dishonesty of today's population. What the neighbours will think no longer restrains the would-be criminal. If he is caught, he may expect as much sympathy as reprobation. If the police ask him questions, he may well gain the impression that it is they who are the wrongdoers. If he admits his crime to the police, and then denies his admission in court, he may expect to see more attention paid to how the police persuaded him to confess, than to how he was later persuaded to retract his confession. It is not to be wondered at if he feels that his responsibility is diminished, and that the public is on his side, rather than on the side of law and order. To quote *The Times* once more, " there is so little uniformity in the strength and direction of moral reprobation."

It would seem, therefore, that here again is a factor quite outside the power of the police to influence. Where, then, lies the solution? Let us return to Hume's proposition, with which this article opened. Dicey, explaining it in his classic *Lectures on the Relation between Law and Public Opinion in England in the Nineteenth Century*, argued that it applied not only in a democracy but in a despotism as well. In the case of the despot, the opinion which supported him was the opinion of his subjects, based upon their reason and experience, that it was better to submit than to resist, despite their contrary opinion in disfavour of the despot. This notion, that a man is influenced by a combination of perhaps conflicting opinions, is of great importance to the police. It accords, of course, with the distinction made by Mr. Silvey, between the glib, ephemeral and emotional opinion, and the informed and instructed opinion, based upon thought and reflection. Is it possible, therefore, that the " popularity " of the police, which we are told is fading away today, was nothing more than the considered, though reluctant, opinion that the police, as part of the Establishment, had better be conciliated? Can it be that the fundamental attitude of the public towards the police always has been (as it was in the early days of their existence) that of the sheep towards the sheep-dog? And that we are witnessing the wearing away, by the operation of a spreading education and economic liberty, of the thin veneer of compliance to which we have all become accustomed?

If this is so, then we all have a pretty problem on our hands. For the scale of police in this country, and their manner of operation and degree of powers, were designed to operate in a society with a high degree of " public morality," drawing strength and assurance from other organs of public and private influence with which the police were in tune—government, press, education, family life and the rest. If the very basis of the police is changing in the way suggested, there is the uncomfortable reflection that a new basis may have to be sought. If public morality and the law drift apart, the law may have to be strengthened if morality is to be raised. Such a possibility would have very real significance to police officers now serving. The police are trained and equipped to deal with those who deviate from the normal and accepted behaviour. It would require police of a quite different character to change the conduct of society as a whole, if society abandons its standards of behaviour. No police officer would care to see his powers extended so that he need no longer rely on the support and co-operation of the public. Nor would any responsible person, one presumes, like to see this happen.

What, then, must be done? It is not for a police officer to describe the duties of others. All he should permit himself is to indicate possible spheres of action. Education, for instance. Is there room in the syllabus of the schools for instruction and education in this sort of field? Is morality less important than science or woodwork? Is there not some hope that a child imbued with a sense of moral responsibility, and respect for his national institutions, will grow into a parent capable of passing on to his own children a better understanding of the dangers of throwing off moral restraints? A child whose father habitually ignores the speed laws, explains with pride how he fiddles his income tax allowances, or brings bits and pieces home from the factory, is scarcely a hopeful prospect for a strong and healthy society.

But perhaps it is to the press that most thoughts turn in this connection. It is easy to exaggerate the power of the press to influence thought. It may well be that the boot is on the other foot, and that popular thought influences the press. The argument here would run that the newspaper proprietor wishes to sell papers, and will therefore portray events in a way which he thinks his readers—and the new readers he is seeking—would like to see them portrayed. If he is successful with his papers, it would mean that he had accurately guessed the thoughts of his readers.

It would not be wise, therefore, for the police to be too easily upset at reading, for instance, in front-page, banner headlines something like: "BLONDE BANDIT IN BARNET BANK RAID," followed a few days later by half an inch on page 7 saying that a girl and two men were detained by police in connection with the Barnet bank raid. Most people have a fundamental antipathy to authority, which is crystallised, so to speak, in a readiness to welcome the defeat of the police—provided, of course, that it is not their home that is broken into, or their little girl who has been raped. From the newspaper owner's point of view, therefore, the failure of the police to prevent the crime is obviously more interesting than the more successful performance of the duty they are, after all, paid to do. Indeed, in the infinitely modified tyranny that the police even in this country represent (one must not forget that tyranny begins as soon as anarchy ends), mild panderings to such a natural, and probably wholesome resistance to authority are perhaps a very good thing. Public pressure on authority checks authority's pressure on the public. And the occasional gentle exercise of this wish to defy authority is perhaps in the end good for the relations between police and public, in that it may act as a sort of safety valve.

Nevertheless, the press do have a great responsibility, perhaps not always realised in the struggle for circulation, for maintaining some degree of balance in their presentation of views. An individual reader, for instance, may have no doubts in his mind about the integrity of the police, though, as has been suggested above, he may also have a deep-rooted antipathy to them and to the authority they represent. To some extent, perhaps, a newspaper may feel justified in playing upon this antipathy. But, as recent instances have shown, some popular newspapers have extended this policy to the verges of denigration, by tendentious selection and sensational headlining. A classic example of this new and dangerous trend is provided by the manner of presentation by certain national daily newspapers (*e.g.*, *Mirror*, *Express*, *Herald*, *Mail*) of the contents of the Memorandum of Evidence submitted by the Law Society to the Royal Commission on Police, in their issues of February 6, 1961. So seriously did the Law Society regard these perversions of their substantially favourable Memorandum, that the Society's spokesman, addressing a public hearing of the Royal Commission on March 8, felt it necessary to declare the Society's confidence in the integrity of the police. But, of course, the damage was done. For the result of such irresponsible misrepresentations may well be that the individual, while retaining his personal belief in the integrity of the police, may in time come to accept as a fact his newspaper's assertion that there is a growing disquiet about the integrity of the police. His personal views are modified, therefore, by the belief that others take a different view. He may never meet anyone who holds this different view. But in time he, and all the other readers, come to believe that there is general disquiet about the integrity of the police, without any one of them having any personal doubts, or knowledge of any evidence justifying the general disquiet.

But it cannot be supposed for a moment that the diminishing ranks of the owners of the fewer but bigger newspapers we can buy are consciously combining to destroy the confidence of the public in the police. What explanation is there, then for the policy which many police officers think is having just that effect? Perhaps the answer is very simple. Richard Hoggart, in his *Uses of Literacy*, written some years before this particular trend started, examines just this very problem. As he points out, the readiness of the public (especially the mass-circulation public) to like tilts at authority, is one of the foibles likely to be exploited by newspapers. So much we have seen already. But a new element is introduced by the intense struggle between the newspapers that is going on today. A paper must not only have an enormous circulation to survive, but it must expand all the time, or be absorbed. As the competitors become fewer, the struggle becomes more intense, and the use of reader-catching devices becomes more ruthless; consequences other than sales are forgotten. If much is good, more is better. Emphasis of police defects passes through bias to outright denigration. Bewildered police officers may notice only the sharpening attacks on the police. But teachers, clergymen, social workers and many others have no doubt noticed increased emphasis on violence, sex and materialism. They are all grist to the mill of those who must expand or die.

From such considerations as these, it is hard to see that there is much more that the police themselves can do in the field of public relations. They have a duty to perform, a duty prescribed by law. It is not an absolute duty, but one which exists solely in relation to the common good. If the public are in fact less prepared for them to perform that duty, certainly no good can come from any weakening in the determination of the police to perform it. Many police officers feel that, if something has gone wrong with the relationship between police and the public, then it is time the public did something about it. Being a citizen in a democracy means more than getting free wigs and playing fields. It means hard work to preserve law and order, and to help the authorities who are in the thick of the fight against crime. And it is here especially that the public need the help and leadership of responsible people everywhere, whether in the family circle, the professions or the press. The history of modern Europe shows that the beginning of a police state is not, as Mr. Napley suggests in his article, an over-zealous police; it is an indifferent public.

The Criminal Law and Public Opinion

A Solicitor's Viewpoint

By David Napley *

Public opinion—mass and minority

What do we mean by the phrase "public opinion"? In the admirable contribution which initiated this series of articles, a Law Officer of the Crown, *i.e.*, a democratically elected Member of the Parliament which makes our statute law, was quoted as saying: "In deciding to what extent effect should be given to the manifestations of public opinion, I think one should try to ascertain to what extent that public opinion is well informed and instructed. . . ."

This gives rise to something of a paradox. If that test were to be applied before giving effect to the democratically cast votes of those who elect our Members of Parliament the probabilities are that a considerable number (if not all) of them would never be elected to Parliament at all. An intelligent and honest elector would decline to vote on the twin grounds that he had insufficient information and insufficient time in which to acquire it. In fact, the vast majority of the general public are neither informed nor instructed on the greater number of public issues and in this respect the law, its operation and objectives are no exceptions. Thus, one finds that whilst a Member of Parliament is not disposed to question the wisdom or knowledge of those who elected him in respect of the issues of the day, once elected he differentiates before acting in accordance with their wishes between those who are well informed and instructed and those who are not. If this is not wrong, it is certainly not logical.

In evaluating public opinion one must distinguish, therefore, between the mass opinion, largely uninformed and uninstructed, and the minorities which are knowledgeable on particular issues. The minority opinions ought, perhaps, to be further subdivided since experience shows, as it is hoped to demonstrate, that the better informed often express two diametrically opposed opinions, the one in private and the other in the performance of their public duties.

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* Solicitor of the Supreme Court (Honours); Chairman, British Academy of Forensic Sciences; President, London (Criminal Courts) Solicitors' Association.

The relationship between police and public

To the vast mass of the general public "The Law," it seems probable, brings first to mind the police. To them a judge, a stipendiary magistrate, a barrister or a solicitor is a being relatively remote and seldom engaged in conversation in the course of a day's march. With the policeman it is otherwise; he is part and parcel of their daily experience and it is therefore the more necessary in maintaining respect for the law that the police should command and receive the approbation of the general public. Mr. Christopher Williams, in an excellent article in this issue, questions whether in fact there has been any significant lessening of public regard for the police and whether a deterioration in the relationship is not a false belief inspired by the journalists. That the modern tabloid form of journalism tends to present an unfair and unbalanced picture there can be no doubt; but it would be foolish to ignore the obvious deterioration that has occurred in public regard. Twenty-five years ago the general public eagerly echoed the oft repeated praise of visitors to this country that "your policemen are wonderful." In time it became a music hall joke; how many citizens express or believe it today?

The climate of public opinion in this country, like the atmospheric climate, is conditioned by prevailing winds. The prevailing winds of mass public opinion are the opinions of the informed and instructed minority. That minority is better instructed because it is more intimately concerned and affected; by the same token it is generally the more vocal. If the newspapers were misrepresenting the facts to the extent that Mr. Williams appears to believe there would be no lack of informed opinion to rush to their defence. The truth, however, is that the police as today constituted and operated leave a great deal to be desired.

Reasons for its deterioration

What then are the reasons for this deterioration? In the first place the difficulties of recruitment, in competition with the more lucrative attractions of industry, led to a disproportionate reduction in standards. It is at this point that one perceives the subdivision of informed opinion into two sectors; the privately and publicly expressed opinion. In their public announcements senior police officers will assert that the police force is a well integrated and harmonious whole with which there is, in reality, little that is wrong. It is easy to appreciate the necessity for them so to express those views to the public. In private, and in their hearts, they have no doubt that many in the uniformed branch hold the criminal investigation branch in something falling short of admiration.

The activities of the uniformed branch are more directed to the prevention of crime; as a body they tend to dislike the stratagems and artifices which some C.I.D. officers employ with one eye on the pursuit of justice and the other on the pursuit of promotion.

This position was put better and more clearly than the writer could hope to express it, in a letter to the *Daily Telegraph* (March 25, 1961) by a lady who described herself as an ex-policewoman and a policeman's wife. "The Metropolitan Police Instruction Book," she wrote, "commences with the words, 'The primary object of an efficient police is the prevention of crime' and the detection of crime and the arrest of criminals are given secondary importance. But when evaluating the ability of a policeman it is so impossible to know how much crime he has prevented that he is assessed instead on the number of arrests he has made and the number of progress reports (notes of offences with a view to summons) he brings in to his station officer. This has a particularly bad effect on the C.I.D. as no P.C. can hope to become a detective constable unless he makes a great many arrests during his period as an 'Aide.' This necessarily encourages would be detectives to embroider evidence, especially in 'loitering with intent' offences. Once he has become a D.C. he tends to continue this behaviour because he has one eye on promotion. It is only in the higher ranks, where detection of serious crimes takes the place of street arrests for petty larceny and the like, that he can throw off this tendency, and by then it may be too late. It frequently happens that a man becomes so convinced of the infallibility of his intuition that he really believes it right to present a case in such a way that the verdict is a foregone conclusion. . . ." Whilst these words should not be taken to embrace the many sound and reliable C.I.D. officers, the writer doubts if there is a single practising solicitor with experience of these matters who would not unhesitatingly endorse those views as applying to more officers than is healthy. Some years ago when the writer protested about malpractices to a most senior police officer he replied, "Show me corruption amongst my men and I will leave no stone unturned to eradicate and punish it, but I will not lift a finger to discourage over-zealousness." He seemed unable to agree with the riposte that over-zealousness in a police force was the beginning of a police state.

The judges and magistrates are, for the most part, alive to these tendencies in police officers. They, however, are faced with an understandable dilemma. Viewed objectively it seems reasonable to suppose that where there are grounds for believing that a police officer may have exaggerated or embellished his evidence, he should be regarded as unreliable and his evidence should be rejected *in toto.*

This, on the other hand, would so discredit the police force that the whole system would be in danger of breaking down; unless, therefore, there is the clearest evidence to support an allegation against the police the courts must perforce accept the police evidence. Needless to say, from the very circumstances—where it is the word of the accused against the police—that weight of evidence is seldom available.

Just as public opinion is divided into several parts so is public reputation. The police have a corporate as well as an individual reputation. As a corporate body it is undoubtedly true that "the country is well served by police forces whose integrity and ability are very high," but the police should not allow this fact to blind them to the individual weaknesses and unjustifiable excesses of zeal in individual officers and classes of officers.

Decline in the public sense of responsibility

The next paradox which this subject reveals is that over the last thirty years the increase in the opportunities for and the standards of education has corresponded with a decline in the public sense of responsibility. In a political climate in which the State is presented in the roles of universal provider, father, mother, sister and brother, it can hardly be the occasion for surprise if the moral standards of a nation deteriorate. The real occasion for surprise is that those standards remain relatively so high.

For many, personal endeavour has lost its primary and significant importance. The pattern is so well known that it requires no elaboration here. One questions whether the benefits of, and the ameliorations of social hardships wrought by, the Welfare State, may not have been vastly outweighed by the damage suffered in the national character and the accompanying loss in the national sense of responsibility and personal dignity. Thirty years ago thrift was a virtue; today, as a nation, we live above our incomes. Thirty years ago it was praiseworthy to help the poor, aged and distressed; today, such thoughts are off-loaded to the State. Then, it was natural to be proud of being British, of British achievement, prowess and craftsmanship; today, it is fashionable to denigrate ourselves. Then, parents sought to inculcate a search for adventure and opportunity; today, the cry is for employment with minimum hours and maximum pension rights. It was as true 100 years ago (when Lincoln said it) as it is today that "you cannot build character and courage by taking away a man's initiative and independence. You cannot help men permanently by doing for them what they could and should do for themselves." The opinions of the public must be the manifestation of the sum total of their emotions, experience, knowledge, understanding and character. There may be greater rewards awaiting those who can refashion the national outlook and opinions than those who would rebuild and extend the prisons. All this repeatedly reflects itself in the daily experience of solicitors.

Fear as an influence on public opinion

If there is one human emotion to be singled out today as operating above all others in shaping public opinion it is fear. Against this background we need not share Mr. Silvey's surprise at the results of public opinion polls or, necessarily, assume their conclusions to be unreliable. It is probably correct that the public now sees crimes of violence and sexual assaults as " the worst and most serious crimes." It is, no doubt, true that the public fail to notice the preponderant number of cases of larceny and fraud. The adult population does not see the solution to the problems of violence and sexual assaults as lying (as it does) within the confines of their own homes, their precepts and teaching. This is another task for the State and since it is thought to be the only remedy open to the State (thus allaying their fear that they and theirs may be the next victims) let us have more hangings, more corporal punishment, more and longer terms of imprisonment. Whilst in some cases these measures may be justified, they are not the answers to the problem. They may or may not be palliatives; they do not appear to be cures. By the same token, neither the adults nor the juveniles generally appear to be much concerned with the incidence of larceny and fraud. In conditions where the take-over bidder is king; where wealth is too often regarded as a better yardstick for social acceptability than integrity; where the order of life is the survival of the slickest; where full blooded materialism is, on both sides of the Iron Curtain, the order of the day, it is inevitable that the public should be least concerned about them.

Public reluctance to help the police

The police complain, and justly so, that they receive insufficient assistance from the public in the detection of crime and the apprehending of criminals. The solicitor is made conscious of this reluctance. Is this, however, not equally symptomatic? The fact is that even when proceedings are under way there is a reluctance to come forward whether as prosecutors or witnesses. The citizen finds intolerable the financial loss which he suffers whilst attending court (the scale of fees permitted does not begin to compensate him). He fears the publicity. Against his own unequal struggle to "keep up with the Joneses" and against penal taxation he appears to feel, in his heart, more sympathy with the defence than the prosecution. Most of all, it seems, he resents the waste of his time.

Respect for the judiciary

Mass public opinion, however, without doubt holds the Bench in the highest regard. The incorruptibility, integrity and wisdom of our lawyer judges has become legendary. Inevitably, they bring lustre to the whole legal system. Lawyers and those more intimately concerned and informed would justify their limitations as being such as can be explained and excused in any system in which human fallibility plays a part.

Recent years have produced reforms such as state Legal Aid and Advice. The Law Society has played, and continues to play, a vital part in interesting and educating the public as to the machinery, operation and importance of our legal system. Just as the increase in motor traffic has brought the general public into closer contact with the police, so it has brought them in turn into greater contact with the law. When the trial is concluded, the court has risen and gone, and the advocate has hurried off, it has always been the unhappy task of the solicitor to explain to the client the reason why he lost the cause.

As the circle of those encountering the law increases, so that number tends to move out of the class of the uninformed and uninstructed mass opinion into that class which is more inclined to question whether there is not room for necessary reforms. No single factor is more important in preserving liberty than the maintenance of respect for justice and the rule of law. What then are the matters of which litigants complain to their solicitor when their cases are concluded?

It might be supposed that those who have lost a cause would, from that alone, be critical and dissatisfied with the standards of justice and trial. Experience shows exactly the contrary. Given a competent, patient and impartial judge, it is seldom, if ever, that complaint is heard, even from those who continue to assert their innocence and express a desire to appeal.

It is otherwise, for example, where the judge although striving to do justice is deaf and clearly hears only part of the evidence. Litigants likewise complain where the judge steps into the arena and gets himself mixed up in the dust of the conflict. They resent impatience. However trifling and tiresome it may seem to the court, the fact that a downstairs tenant is constantly making threats and hurling insults is a matter of the greatest concern to them and to their health.

Curiously enough, it is not only when their own interests are affected that they lose respect for the court. Fair play is fundamental in every breath which the British take. They resent no less an unwarranted attack on a police officer who they feel has done his duty and no more. They bridle when, having been acquitted, they are told by the court they were lucky and they had better not find themselves there again. They never forgive irascibility, even when the solicitor explains that it is occasioned by ill health; they resent sarcasm or bigotry. At the other extreme they display unrestrained admiration for the judge who detects the weaknesses of their own story and demonstrates those weaknesses by logic and common sense. In short, so high has been their regard for British justice for so long, that when they encounter its rare, but ever present imperfections, they are the more shocked and disturbed.

Bad appointments to the Bench, at any level, seldom occur but even a few can do irreparable harm to the British conception of justice in a community which is becoming increasingly aware of the legal system. A man may be a brilliant lawyer of great experience but by nature and temperament wholly unsuited to judicial appointment as judge, chairman or magistrate. There are few fields of activity in which persons may be appointed without any period of trial and test and where they are required to carry so much responsibility whilst sustaining respect for one of our greatest institutions. It is for question whether every person upon judicial appointment should not first be made a deputy or subject, in some other form, to a period of probation. Once fully appointed more difficult questions arise. It is clearly not in the interests of the community that those who sit on the Bench should be easily and freely removed. It would not seem unreasonable, however, that their appointments should depend not upon their age (since some of our finest judges have also been our oldest) but upon their satisfying an independent panel of doctors that the state of their health and their faculties is not such as to "render them incapable of having proper control" of a trial. Public opinion, mass and informed, would, it is believed, welcome such a measure of reform.

Public opinion and the content of the law

There can be no one in Parliament who is not alive to the importance of preserving, at the highest level, public opinion of the law. Whilst there might be law without Parliament, there can be no Parliament without law. It should, moreover, be remembered that nothing lessens public opinion of the law to such an extent as the retention of bad, and the passing of illogical, laws. When the Homicide Act has reduced the punishment of murder to absurdity, it is against the lawyers who have to administer it and the police who enforce it that the public directs its criticism more than to the statute which created it. If new licensing laws merely substitute new absurdities for old and are out of harmony with the wishes of the majority of the public, it is again the legal system which will administer it and the police who will enforce it who, in the ultimate analysis, will carry the burden. It cannot be too strongly stressed that the greatest service which can be rendered to the cause of liberty is the provision of laws which command public support. That the Government is alive to this fact is evident from the inquiries into law reform which are constantly being instituted. Public opinion will be in accord with the best interests of lawyers and policemen when the public are convinced that the latter are engaged in pursuing sensible measures, in a just fashion, in furtherance of the common weal.

This fact remains, however, whatever may be the state of public opinion in relation to the criminal law (and in general that opinion, it would seem, remains high), that no one will doubt its transcendant importance in sustaining, within a free society, a system which enables its own defects to be publicly discussed.

[1961]

Mass-Media and the Public Attitude to Crime

By BRYAN WILSON, B.SC.(ECON.), PH.D.

In the 1930s it was a fairly common thing for the mass-media—in particular the cinema—to receive rather intemperate blame for the extent of crime and juvenile delinquency then prevailing. Much of the criticism was superficial and ill-informed, and in these circumstances it was not difficult for the cinema industry to rebut these attacks as unfounded and alarmist. But even at that time the thesis was taken more seriously by some investigators, and even in early studies evidence was accumulated to show that the cinema had some significant effect—albeit as one of a number of influences, among which others were perhaps more profound—on children's social behaviour.[1] Because the cinema was presenting almost entirely fictional material it tended to draw more criticism than did the newspaper press which was, at least theoretically, presenting largely factual material. The advent of television has in some ways made more apparent the similarity of the types of influence which all the media of mass communication may exert, and has in some measure made the previous distinction between fictional and factual material seem rather less relevant.

The influence of mass-media on social behaviour

No serious writer on the subject would today suggest that the mass-media were principal causes of crime and delinquency. What might more reasonably be suggested is that the influence of these media has played a considerable part in altering our attitude to crime, in providing our society with a new structure of values, and in disseminating information and providing models for social deviance. A thorough-going analysis of crime in contemporary Britain would necessarily take into account the changing structure of our society; the strains of increased social and geographic mobility; the breakdown of patterns of stable community life; the consequent loss of agencies of social control, and the reduction of social control in the anonymous context of urban living to the lowest level of what is "upheld by the law." And yet the mass-media are also a part of these social conditions, and in that the transmission of information and the business of communication has grown increasingly important with social development, they are a factor with increasing influence in the moulding of social behaviour. Even if these media were concerned only with the transmission of ideas it would be reasonable to postulate that they must thereby influence the attitude and behaviour of the public. In fact they do more than this: they set out to appeal much more to the emotions than to reason, more to the deeper-laid sources of motivation than to the intellect. Likewise, we know that they exert a selective influence—greater on those groups from among whom delinquents are principally drawn: just as the cinema has tended to attract as most frequent attenders those of low intelligence and those in need of escapist activities, so too television is viewed less by intelligent children who are more easily bored by what it presents.[2]

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[1] See for example Herbert Blumer and Philip M. Hauser, *Movies, Delinquency and Crime*, New York, 1933, and M. I. Preston, "Children's Reaction to Movie Horrors and Radio Crime," *Journal of Pediatrics* (19) 1941, pp. 147–168.

Discovering by direct inquiry the exact effect of mass-media on the attitudes and behaviour of the public is difficult, and some would say impossible. Attitude-testing is one of the least satisfactory areas of social inquiry. This is so because the situation in which tests are undertaken is so structured in the attempt to eliminate the influence of extraneous factors, and the questionnaire procedure so artificial, that the information obtained must always be of doubtful value and validity. The effects of exposing people to a particular programme or news-story must necessarily be slight and of short duration. The really significant influence of the mass-media is necessarily more subtle and of gradual development over time. There are, however, other methods of analysis which, if not conclusive, are at least suggestive. One approach is to examine those who are most addicted to mass-media and to discover their particular social circumstances and psychological dispositions. From such research it is possible to say that maladjusted children show a marked preference for violent and traumatic material.[3] (Most of this research has been undertaken with children because children are more susceptible to direct influence; the public is generally more concerned about what influences them; and they lend themselves to easy testing in standard circumstances in school.) A perhaps more relevant approach is the content analysis of the material presented by the mass-media themselves, and the examination of the possible functions of this type of material in contemporary society.

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[2] UNESCO. Reports and Papers on Mass Communication No. 31. *The Influence of the Cinema on Children and Adolescents,* Introduction. See also H. Himmelweit "Television & Radio" in *Popular Culture & Personal Responsibility,* Verbatim Report of a Conference, October 1960. N.U.T. London, p. 157.

[3] Mark Abrams, *Popular Culture & Personal Responsibility, op. cit.* p. 62.

Mass-media and crime

Even those who have been most reserved in their opinion on the effects of mass-media on crime and delinquency have been prepared to assert that much of the material presented by these media is in itself nauseous and tasteless.[4] Certain more specific points can also be made, some of which I shall return to in the space available to me:

(i) Mass-media have paid a great deal of attention to criminal activity as such: they have exaggerated its extent and frequency, and provided the purely factual with a context of drama. They have been particularly attentive to violence, both criminal violence and violence which, in the context of the programme, is not specifically criminal.

(ii) From various studies we know that mass-media have provided those with anti-social dispositions with vivid fantasies, and there is some evidence that they have also provided the criminally disposed with ideas and technical knowledge for criminal activity.

(iii) They have served as agencies of cultural diffusion, transmitting criminal ideas from one society to another, and thus providing new forms of expression for social deviance: this is particularly the case with the film, television and comics which readily pass over national frontiers.

(iv) They have created a new value for what they determine is " news " the content of which, as we have seen, is largely social deviant activity.

(v) They have thereby helped to create a climate of greater tolerance for deviant behaviour and for the provision by the media of salacious materials which can serve as stimulants to social action for those so disposed.

(vi) In fictional presentations they have frequently and increasingly built stories around the " delinquent-hero " as a cultural type of our society.

(vii) They have presented deviant behaviour as a part of the youth-culture and as a legitimate challenge to the existing social order, so that in some measure it has gained a favourable connotation as something associated with progress. This is particularly true of media directed towards teenagers.

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[4] Report of the Departmental Committee on *Children and the Cinema*. Home Office. London, 1950; Barbara Gray, " The Social Effects of the Film," *Sociological Review*, XLII 1950, p. 12; also Mark Abrams, *op. cit.*, p. 61.

(viii) They have provided the glamour of publicity for criminals, thus adding the satisfaction of the appetite for fame (which in our society means "newsworthiness") to the other motivations for crime.

The media as agencies of persuasion

To suggest that these are functions which mass-media have fulfilled in our society is not to suggest that these influences are unmitigated by other circumstances. The influence of the media is probably rarely direct, and rarely in evidence in the perpetration of particular crimes except in unusual circumstances. We have already suggested that there are immense and perhaps insuperable difficulties in response-analysis, and yet it is reasonable to suggest, from content-analysis and by inference, that the mass-media are not without effect in our society, although we would expect that effect to be cumulative, widely diffused and gradual in its operation, and not immediate, specific and sudden. We have to remember that the media are often proud to present themselves as agencies of persuasion. In fixing their advertising rates they have no hesitancy in claiming for themselves a most extensive influence over the general public. Both ITV and Radio Luxemburg as well as newspapers and magazines, work on the assumption that they do influence people, and that they do it significantly: indeed it is the fact that advertisers believe this which alone keeps many media of mass-communication in business. The advertisers themselves are concerned only with the profitability of persuasion, and they have undoubtedly satisfied themselves with the efficacy of these agencies in moulding tastes and preferences in the short run, and perhaps more profound values in the long run. Advertisers have sometimes set out on quite long term projects to alter the public's values in particular ways, and from the big business which advertising has become it must be presumed that they have frequently succeeded. The vigour of the demand for another commercial television channel illustrates the strength of conviction about the efficacy of mass-media as agencies of persuasion. There is also some evidence to suggest that young people in particular have acquired various sorts of knowledge from the cinema—deportment, courtship responses, manners, the use of cosmetics and—who will doubt?—an extended, if sometimes tasteless, vocabulary.[5] They have learned, undoubtedly, what sort of behaviour is currently fashionable among their peer-groups, what the prestige gimmicks are, and how to " cut a figure " with the opposite sex. No doubt the public has also learned to resist the persuasiveness of mass-media: a type of cynicism alternates with extreme credulity in public discussion of screened or printed material. There is frequently a deference-acceptance of what the media present, because the media have the prestige of highly technical authority. But even if the public's attitude to these media is ambivalent, there is no doubt that the media are influential persuaders, and by implication have affected public attitudes.

The general public has an avid appetite for the criminal, the violent, the salacious and the sensational. But in just what measure it may indulge these appetites depends to a very considerable extent on the values of our mass-media, for it is the mass-media which themselves establish the degree of " permissiveness." There has been competitive catering to these appetites and the deliberate stimulation of public interest by creating " sensations." The appetite is no doubt there in the public, but it is the media which have stimulated it and vied with each other in the presentation of material to satisfy it. Employing the specious rationalisation that the " public has a right to know " they have extended the range of subjects which can be freely discussed, so that today issues which thirty years ago were more or less unmentionable are almost casually discussed in the press. They have built up round the sensational a cult of spurious sentiment by interviewing the relatives of victims and seeking statements from anyone connected with the central characters of a crime. Even the B.B.C. has resorted to this type of trading on sentiment and sensation—aware of its need to compete in these directions in order to hold an audience. Frequently this approach is accompanied by expressions of moral concern: sometimes, indeed, " exposures " are justified by the expression of moral indignation on the part of the reporters. For some newspapers, and some television programmes, this is an almost stock pattern for the presentation of material which might otherwise be " too hot to handle." The device is not very subtle, but it allows the audience to indulge its appetite for the salacious and sensational and, in the expression of moral concern, to assuage any guilt they might feel at such indulgence. Perhaps the most serious consequence for public attitudes to crime, however, is the fact that repeated presentation of this type of material makes morbid appetites appear to be quite acceptable and normal—sanctioned by the values and standards of the media themselves.

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[5] See, *e.g.*, William Wall and W. A. Simson, " The Effects of Cinema Attendance on the Behaviour of Adolescents as seen by their Contemporaries," *British Journal of Educational Psychology*, February 1949, pp. 53–61.

Their effect on social values

The average individual in Britain today gives more time to mass-media—in particular to television—than he gives to reading books or to part-time education; children spend almost as much time with mass-media as they do in school. The media increasingly provide the material which people talk about, they provide the stuff of conversation. Conversation and interests are thus fed by what the media provide, and it is altogether predictable that the attitudes of the mass-media should be taken in with the material. Studies in America have shown us that the public there is extremely uncritical of what is presented to them by television—and there is no evidence to suggest that the contrary is true in Britain.[6] Commentators and writers frequently and glibly assert what people are thinking; they talk and write as if they had hidden and immediate insight into everybody's thoughts. But in doing this they probably help to mould and construct attitudes. More important is the long-term consequence by which these commentators influence popular values. Commentators and fiction writers often present crime as a type of cleverness—particularly is this the case with dramatic armed robbery. The skill, imagination and the adventure are emphasised, and the fact that the robbery is a competition of brains between crooks and policemen. There is even the suggestion, sometimes, that if criminals are clever enough, then they deserve to win. In a society where success is held up as the goal for everyone, and where something-for-nothing is a widely sought objective, this type of crime may not appear as too radical a departure from the various other avenues to quick achievement. Physical violence is frequently presented—particularly in fiction—as the means whereby wrongs are righted, problems solved and disputes settled. Revenge is frequently depicted as a laudable motivation in social action. Parasitic activities, luxury and " easy " living are often presented as attractive and desirable. All of these values stand in stark contrast to the values entrenched in our existing social institutions—the family, the work-place, the school, the law courts, the church, and in our social relationships. It is difficult, faced with these facts, to absolve mass-media from the charge of promoting the erosion of traditional social values, and of creating confusion particularly among young people about standards of behaviour. It is reasonable to suggest that they have some responsibility for the climate of indifference towards, and tolerance of, social deviance in contemporary society.

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[6] Rolf B. Meyersohn, " Social Research in Television," in *Mass Culture: The Popular Arts in America*, edited by Bernard Rosenberg and David Manning White, Glencoe, Ill., 1958, p. 347. See also Paul F. Lazarsfeld and Robert K. Merton, " Mass Communication, Popular Taste and Organized Social Action," in *The Communication of Ideas*, edited by Lyman Bryson, New York, 1948.

As long as mass-media were rooted in local communities—as newspapers used to be—they tended to reflect the value-consensus of these communities; they had concern for, and felt responsible towards, their public, particularly since this public was identifiable. The growth of mass-media and the disappearance of local agencies, and their declining significance in the face of national media, has all meant a gradual loss of moral concern. It has meant that the media increasingly reflect London attitudes and values—the morality of the big city which, as sociologists have shown, is a different morality from that of smaller communities.[7] The anonymity, impersonality; the spirit of calculating the consequences of action; the acceptance of money values as the final criterion of achievement, the emphasis on role rather than on personality; and ultimately the manipulation of personal sentiments and the " prostitution " of attitudes of genuine human concern—are all well documented phenomena of metropolitan life. In the mass-media, therefore, we see the reflection of these values, together with the false sentiment of " human stories "; the manipulation of sympathy for the relatives of murder victims often accompanied with acts of utter callousness by the reporters who get the interviews; the slick and smooth exploitation of human situations of enduring concern for the purely ephemeral interest of " a story." The dissemination of these values, and the corrosive influence which they exert on local communities, has been one of the most spectacular consequences of the great growth of mass-media in the past two decades. Since the media compete with one another they stimulate a common climate, grow curiously more alike and more imitative of each other, and help to depress each other's standards further.

Imitative crimes and the desire for publicity

The way in which mass-media have disseminated criminal ideas can be easily illustrated with a few pertinent examples. Even before the war there was an interesting case in Yorkshire. A girl reported to the police that she had been attacked by an unknown assailant. The story received dramatic publicity in the northern editions of the national press and within a few weeks a large number of cases were reported—the press talked about "the ripper." In fact all the cases (except perhaps the first) were discovered by the police to be cases of self-inflicted injury. In one sense the press had created "the ripper"—such was the desire for publicity and sensationalism. The rash of swastika-painting last year illustrates this process even better. Anti-semitic activity in Germany received widespread attention in this country, and there followed a series of incidents in which swastikas were daubed by young people in Britain and elsewhere in Europe. These acts had no political significance in fact—they were simply socially hostile acts which were stimulated by the dramatic publicity which the first incidents had received. In this case the role of mass-media is indisputable because of the distinctive nature of the deviant activity: in other cases it is probably as influential but more difficult to isolate and identify. The recent outbreak of railway hooliganism might have occurred without the attention of mass-media, but it seems much more likely that publicity plays a significant part in disseminating information and influencing people in the pattern of their deviant activities. Railway coaches—now much more frequented by young people than formerly—are public places of sanctioned confinement. There is little likelihood—between stations—of interruption. Their position is exactly similar to the sanctioned darkness of the cinema. Both places are difficult areas for the operation of ordinary social control—either for the expression of common public decency or for the operation of the police. These two locations, then, are propitious places in which to commit socially hostile acts—places in which to release the tension of frustration in aggression. Some, no doubt, would act in this way without any incitement—but these hostile acts gain more attraction because they come to the attention of the public—and do so without much risk for the perpetrator. News-stories, television commentaries, photographs in the press, become an added source of satisfaction to the miscreant—an occasion for boasting within his peer-group, of having done something which is significant. The publicity, then, becomes an added incentive to misbehave in this particular fashion. Many social deviants are publicity conscious; the tendency for criminals to keep diaries, to collect news cuttings of their crimes, and to be proud of their infamy, is a matter of common knowledge to the police. It is from the mass-media that these extra gratifications are sought—and not sought in vain.

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[7] This thesis has been demonstrated by several sociologists, in particular by Ferdinand Tönnies, Max Weber, Georg Simmel and Lewis Mumford. A simple exposition is to be found in R. M. MacIver and C. H. Page, *Society*, London, 1949, pp. 291 *et seq.* and 310 *et seq.*

The root causes of crime are not to be found in the mass-media, but the public attitude to criminal and deviant activity is considerably affected by them in various ways. They are increasingly influential in moulding the climate of opinion—perhaps even more effectively than the educational and religious agencies of our society. The full significance of the influence of television, radio, cinema and press will perhaps never be adequately measured, partly because their influence cannot be isolated, and partly because it is an influence which is gradual and cumulative. There will, no doubt, always be those who present a simple picture of the " public service " image of these agencies, and who will offer plausible but essentially superficial arguments about " giving the public what the public wants." But from an analysis of the content of the materials these media present, and their method of handling them, and from some investigation of the motives of those who produce them, and the dispositions to which they appeal in the general public, it seems quite clear that the mass-media have an important role in moulding the public's attitude to crime.

Public Opinion and Law Reform

By W. J. BOLT, LL.M., PH.D.

Public opinion is a great imponderable which, from diverse motives, has begun to excite attempts at statistical measurement and evaluation. In the world of commerce, new disciplines like consumer research have been enlisted for the purpose of assisting salesmanship; in the academic world, psephology seeks to appraise the drifts of partisan allegiance among voters.

Two recent publications reflect a parallel interest in the same factor as it bears upon movements to amend the law. This is a new range of speculation from which the social historian, the sociologist, the psychologist, the legislator, the reformer and the political manager dare not withhold their curiosity.

"The Crusade against Capital Punishment" (Tuttle)

In *The Crusade against Capital Punishment* (Stevens & Sons, Ltd., 1961, 30s.), Elizabeth Orman Tuttle makes an historical survey of a reformist movement which began, much less than two centuries ago, with a few solitary voices crying in the wilderness and has forced into the foreground of public controversy one of the dominant issues of our day. Some such genealogy was bound to come, and this first effort must be applauded as a notable success. Abolitionists and retentionists alike will understand their own opinions more clearly for seeing them in so full a perspective.

Dr. Glover's Foreword makes two emphatic points: ". . . the Great Moral Debate takes shape before our eyes and as its fortunes sway one is increasingly impressed by the fact that, from whatever source the protagonists drew their propagandist energies, here is an issue that, transcending politics, indicates a profound cleavage in the minds of those who are actively concerned with the public weal"; "Mrs. Tuttle does, however, bring out the fact that during the welter of opposing argument, the humanitarians began to borrow strength and support from scientific sources."

His congratulations to the author on "reducing a tangled skein of opinion to order" neatly epitomise the pattern of the evolving process. Whatever the outcome of the conflict, the contrasted tenets are factors with which everyone active in the promulgation or in the application of the law must, in duty, familiarise himself. Mrs. Tuttle's research is less of an academic luxury than a practical manual. Her own allegiance is overheard rather than heard. This is no propagandist pleading, but a carefully marshalled and annotated survey.

After a tribute to the pioneering reflections of Beccaria, Bentham and Romilly, she surveys the Victorian era, when the issue became sharply defined. The nineteenth century, when the notion was canvassed only in small obscure circles, occupies only one chapter of the book; but in our own century interest became so disseminated that each decade needs a special chapter to record its expanding development; and the author is scrupulously fair in delineating the basis of anti-abolitionist tenets.

There is invaluable raw material for all political organisers and propagandists in the author's detailed account of successive rounds of parliamentary conflict and their repercussions in current newspapers and journals, all enveloped in an impartial reporting of many viewpoints.

A minority movement

But the conclusion clearly emerges that this issue of capital punishment was never a preoccupation of the electorate or of the masses, but of a small minority, a fermenting handful of intellectuals and humanitarians, and of the legislature, on whose rather unwilling attention the conflict was forced. The public men occasionally cast a glance upwards at the public gallery, and a passing deference to " public opinion " shows up at intervals in the background of their observations. Thus, at page 133, the Joint Under-Secretary of State for the Home Office asserts that the Homicide Bill has been framed " to agree with public feeling on the issue of capital punishment " ; at page 136, the Archbishop of Canterbury expresses the opinion " that (the Homicide Bill) satisfies public opinion better than any other course would " ; at page 143, " the Government claimed that public opinion desired a compromise and did not want total abolition. This was by no means a new argument, since similar references to public opinion had been used in all the capital punishment debates since the days of Romilly."

A noble chapter on " The Status of the Crusade " recalls the steady emergence of the topic in public discussion, yet we must remember that this concern was confined to a small segment of the community. The author's wide research has apparently not disclosed to her that, for over a decade, one journal which in the nineteenth century enjoyed wide prestige among the administrators of the law, *The Justice of the Peace*, steadily maintained a sober abolitionist propaganda.

If Mrs. Tuttle had ever studied the campaign from inside our shores, her work would have a deeper perspective. The newspapers and records over which she has pored naturally do less than justice to the true protagonists whose sustained propaganda kept public opinion simmering. Her work would be a more proportioned history if she had looked less at the debates in high places and more at the persistent pressures maintained by John Paton, Mrs. Roy Calvert, and Victor Gollancz. No purported history of the crusade could realise its aim without a fuller appraisement of the work of these stalwarts.

"The Struggle for Penal Reform" (Rose)

Gordon Rose's *The Struggle for Penal Reform* (Stevens & Sons, Ltd., 1961, 50s.) surveys a wider landscape and therefore needs a larger canvas. Such a study must notice the abolitionist campaign, and give it a duly integral place.

Central to such a narrative, so far as it relates to our islands, must be the history of a single organisation, the Howard League, a body which must be a teasing factor in any contemplation of public opinion or of law reform. In no other major publication has this tiny but potent pressure-group received such close attention. Its strategy and tactics are *sui generis*—like nothing else on earth. Its unique contribution to our legal and political history has never been so carefully assessed as in this work by Gordon Rose, and we may usefully pause to ponder this prodigy, now fully unveiled to the outside world.

The League's distinguished Secretary, Mr. Hugh Klare, notes in his Foreword, " if small societies like the Howard League nowadays have to have recourse to public relation methods in order to make their presence felt amidst the clamour of modern public life, it may at least be said in their favour that their members gain nothing from the proposals put forward on their behalf." His disclosure of the apparently accepted qualities which should animate the Secretary, finesse, restraint, selectivity of tactics rising to a high cunning, suggests the inference that only Machiavellis need apply. Expertise in subtly organised propaganda appears to find such attributes indispensable in the disinterested promotion of an altruistic cause.

Gordon Rose is somewhat ingenuous in his misuse of a familiar legal and political phrase. His Preface says, " Since it is no more than fair to the reader to declare an interest, I should say at once that I am a member of the Executive Committee of the League. Because of this I have throughout been acutely conscious of the possibility of bias," which is surely an illogical inversion of cause and effect. For there are occasions when law requires a company director, or an elected member of some public bodies, to " declare his interest "—reveal his potential rights, presumably beneficial to him, in some transaction, and the phrase may conceal from us this author's true relation to the League. He derives no financial benefit from his membership. It is not that he admires the League or is the more prone to bias, because he pays an annual subscription; on the contrary, he pays an annual subscription because he finds so much to admire.

For no one, whether he be a subscribing member of the League or an outsider, dare attempt any history of penal reform in this realm without making that one organisation the centre-piece of his picture. Whenever the topic is mooted, no other society must spring so immediately to the mind or be dredged from the subconsciousness of forgotten memories. And yet, so deliberately demure in its deportment is the League, that its very name is hardly known to the many millions in whom public opinion must putatively be located.

Mr. Rose's book is an achievement of dedicated study, and should become a landmark in the history of penology. It is an exact statement of everything relevant. Here, the exact pedigree of the League is traced in detail. Here, every little wavelet in the advance of the great tide is correlated with the moon-changes of social change. Every reform and every reformist trend is depicted in a natural setting of communal attitude. The author is too well versed in the social sciences to treat penology as if it existed *in vacuo*, or to take penal trends out of their native context of sociological condition and ideological climate. He sets a clear limitation between penal reform and prison reform, a distinction lost on the uninitiated. For prison-theory is but one department of penal theory, and imprisonment is only a late arrival in the catalogue of penalties, though it now over-shadows all others in prevalence and prominence.

Here is an Almanack de Gotha of great and little names, and of many forgotten projects. It is a list of acknowledgments, of innovations, big and small, which made important contributions to social defence—even the inauguration of women police, over which at the time public opinion stampeded. Legal aid, magistrates' courts, young offenders, after-care, probation, changes involving countless tensions and skirmishes—the author takes them all and weaves them into the pattern of one big campaigning strategy.

The work of the Howard League

The section of the work most relevant to the present inquiry is Chapter 18, " Pressures and Policies," a survey of pressure-groups in general and of the Howard League in particular. That organisation has never been blessed with a large membership or an abundant income. Its chief asset has been a small active Executive, elected without mandate. The author deduces from his investigation that the power of the League rests mainly on two factors, its public reputation (which is, in my opinion, not so public), and the manner in which the British democratic system is organised to allow the harrying of officialdom. He finds that the addiction of the League to accuracy is the basis of its expertise and is the keystone of its rare prestige in the international arena.

He stresses the uncommon degree of political nous with which its leaders are endowed. Thus, " neither the League nor its predecessors invented probation, nor children's courts, nor remand homes and centres. What they did was to see clearly the importance, the usefulness, and, indeed, the inevitability of these developments, and hasten them along in the face of those who did not see this " ; " The great aim of the reforming society is to be able to say, 'I told you so,' and in this, the League has been very successful, constantly making proposals to committees of inquiry which are sufficiently close to the general trend of opinion, sufficiently practical and sufficiently far-sighted to become embodied in their recommendations and later in legislation. Most of this represents a crystallisation of experience and opinion, and a clear perception of trends—in other words, the League is doing what a committee of inquiry does, digesting information and opinion, and producing workable proposals. It is, in fact, a permanent unofficial committee of inquiry." (p. 267).

It would have been invaluable to the present symposium if Mr. Rose had given some inkling of the secret of this success—how the League attained such signal insight into " opinion " and " trends."

He continues, " Knowledge, achievements and intelligent prediction of events are not, however, enough. There need to be, in addition, some means of demonstrating opinion to the authorities, and of bringing pressure to bear on them. The methods of doing this are deeply ingrained in the parliamentary system and the accepted modes of democratic behaviour " (p. 267.)

The next section of the chapter is captioned, " Who is pressed? " and contains a revelation germane to our inquiry. The Howard League, for all its long record of successful influence, has never concerned itself with frontal attacks on public opinion, or with indoctrinating the rank-and-file of the electorate. Its quarry is always the "Establishment," either the legislator or the civil servant. Its methods are never blatant or exhibitionist. It organises no rallies in the Albert Hall or demonstrations in Trafalgar Square. It takes no part in electioneering campaigns, hires no advertisement page in *The Times*, and spends no money on handbills or placards. If its techniques are a licit and judicious exploitation of democratic process, its focal activities are nevertheless enacted behind the scenes.

The English way of government is a felicitous alliance of private enterprise and official routine, of unpaid devotees and professional bureaucrats; and the Howard League bestrides these dichotomies by making and keeping friends in both worlds. Its astuteness, casuistry, and worldly shrewdness are ennobled by their dedication to sublime purposes. But its pressure is always directed on the powers that be; and the sympathies and support of the faceless millions are never canvassed or enlisted.

Sceptics might infer that this strategy is based on a cynical assumption—that democratic government is but a pretence, a mere mask, and that "public opinion" as articulated in the voice of the people need never be taken into reckoning. Does it imply that, whichever way the millions vote or whichever party caucus nominates the Prime Minister, the only people who matter, who are worth lobbying and buttonholing and pressurising, are in the Palace of Westminster, or in Whitehall, or in Horseferry Road? Our inquiry would be assisted greatly by Mr. Rose's further observation on that point.

Public opinion in contemporary society

Whenever public opinion is discussed, Professor Dicey's *Lectures* are cited. They are the only examination of the problem by an English scholar of any stature, but we in the sixties must remember their limitations. We dare not apply his observations and conclusions to our own day and its conditions without recalling the violent changes that have come over the landscape. The electorate, in whom the only relevant public opinion must be presumed to reside, has been enormously expanded by successive extensions of the franchise. Public facilities for "education" have multiplied (though this does not necessarily import higher levels of intelligence or political understanding), and the influence of the "mass media" has sharpened in focus and intensity. We should digress too far in considering how far Dicey's propositions need to be modified in 1961, but his survey must not go unmentioned.

Hoggart's *The Uses of Literacy* is an illuminating insight into the effectiveness of the educational leaven.

The police and public opinion

Of all sections of the community, none need a keener professional interest in public opinion than the police force, but police policy cannot always safely be disclosed to the world at large. A mode of security principle operates to prevent the public from knowing how police discretion is exercised. The police would abandon an important rampart of social defence if the outside world could know how "prosecuting policy" is regulated, or who decides, and on what grounds, the degrees of rigour with which specific breaches of the criminal law, known or strongly suspected, are prosecuted. Whatever their methods of assessment, the police recognise the need of avoiding conduct which public opinion will reprobate.

Today there are increasing trends, in this country as in America, to mobilise public opinion as a factor in the control of delinquent conduct. Criminology is passing from aetiological inquiry to a preventive stance. Criminologists perceive that they need to be more empirical in their attitude. We have all inclined to treat crime excessively as an enigma to be unravelled and analysed and pathologised rather than as a communal nuisance, a social affliction to be forestalled and prevented. We wait for the mishap to occur, and send in our State breakdown-squad, which grows in elaborateness and efficiency every year. Public opinion need not always be abstract and retrospective; it can be harnessed as a strong potential in maintaining law and order.

Mass-media

The mysterious interrelation between public opinion and the mass-media which have some part in shaping it, ever invites closer inquiry. Editorial staffs wield immeasurable power in the process of selection and rejection. Ninety-nine readers may write letters to the editor on one side of a controversy. He may omit them all, and publish the one letter which espouses the other side. And his writing of news-captions may give an equally misleading picture of public opinion.

The location and measurement of public opinion

We are still on the fringe of the problem until we can give a satisfying location to public opinion. May we take it as the sum total of the reactions of every rational individual who, whether enfranchised or not, is capable of writing a letter to a newspaper, mounting a rostrum at Marble Arch, or airing his views before strangers on the Clapham omnibus? Or is its articulation limited to voters, those who have any control, however microscopic and remote, over the machinery of government? Surely the public opinion which is supremely measurable is that which is uttered, not in mere words, but in decisive election and selection. It may be less a decision on specific issues than between individuals or party caucuses, but this is the only measurement which is dependable. Yet an election is hardly ever a decision on any one topical controversy. No agreement between party leaders can make any one cleavage of opinion the issue which will be the paramount motivation of the voting. Propaganda and polemics may rage around one point, and the mass of electors still be influenced by factors entirely different. Nothing short of an elaborate census could disclose what, if any, common trend moved the majority of voters in a particular constituency to favour the successful candidate. The ordinary election is too profuse a tissue of complications to bear lucid interpretation.

On the other hand, our own age has reared up a technician who is confident that his methods of assessing public opinion have some validity and usefulness. But every opinion-poll is founded on the evident fallacy that one chancy section of the community is tolerably representative of the whole. It is a superficial technique. The human race is so individualised that no one person interviewed can be deemed typical of any other or others, or any thousand a safe sampling of the whole community. This became abundantly clear in a famous American presidential election.

There is a device by which public opinion on a single issue can be cogently measured—the referendum. Other legal systems employ it in divers circumstances, but English constitutional theory has never given it much scope. A single proposition is submitted to the electorate, and they vote on that and none other. The confusion of secondary factors which attends the election of a candidate does not arise—the allegiance to party caucus, or factors related to personalities, or the distraction of a variety of issues. The choice is straightforward, impersonal, and *ad hoc*. For the rapidity of change in the modern political kaleidoscope has attenuated the old tenet that each election constitutes a mandate to a particular candidate, binding him to a specific attitude or party loyalty. During his term of office, a hundred unforeseen emergencies may arise, whereon he has not committed himself by promise or pledge. Our constitution is unwritten, and nowhere defines any canons of conduct or terms of reference which can legally or morally bind the elected representative in interpreting his duty to the community at large, or to his constituents in particular. "Representation" denotes a past event and not a present or future obligation.

We use the word "democracy" with a glibness which conceals from us how far political organisation has diverged from the archetypal democracies of Greece, the traditional birthplace of the notion. In those small city-states, government was truly by the people, the whole population in common assembly, so small and compact that the selection of "representatives" was not necessary. Each constituent could attend in person. When political communities grew in size, and official assemblies could consist only of deputies, democratic activity needed other doctrines to justify official articulation of public opinion. It has found no satisfying hypothesis even today. In ancient Greece, every decision of the public assembly was a referendum.

So complex has the problem now become, that it is never possible to gauge how representative any elected assembly is of the public opinion of its electorate. Every reflection forces upon us the extreme need for caution and reserve whenever we generalise about public opinion. In form, it is as unstable and nebulous as a river mist. We bow to it reverentially as a spectral feature of our landscape, but we must always acknowledge that it eludes geometrical definition and arithmetical assessment.

Social awareness is almost a modern phenomenon, and the social sciences are no more than parvenus in the academy of learning. The very contemplation of public opinion is an attitude which is still in its infancy. It has received so little scientific attention and reflection that we must be reverently agnostic. Our wild and enthusiastic speculations may well appear infantile after another decade of closer observation.

That should be a rewarding objective, to understand how to probe beneath the shouts and votes and opinion-polls, and assess with some precision the mind and will of the people.

There are some issues on which elections are never likely to be fought, nor the mind of the masses be stiffened into firm, definite conviction. The warfare of penal reform and abolitionism has been waged, not by strong political caucuses, but the small handful, the faithful remnant, the passionate few. And the intensity of the small pressure group has proved as effective as the enlisting of large volumes of public opinion, and without derogation from democratic process.

Public opinion is a fluid shapeless entity, and the characteristic of all fluids is the difficulty of measurement. Precise statistics can be postulated of the Atlantic Ocean, of its acreage, of its depth at specific points. But those who plumb and chart and deduce, are ever mindful of the limitations of their inquiry. No number of soundings at one point can ever yield any useful information about other regions. They must be agnostic in dogmatising about broader overall conditions. The Gulf Stream is still more of a hypothesis than a positive deduction. But the mortification of remembering this does not affect the validity of some of their affirmations. In attempts to generalise about public opinion, this may prove a valuable analogy.

Case and Comment *

ANIMALS

Malicious Damage Act, 1861, s. 41—killing a foxhound—no proof of actual damage to livestock by the dog

Workman v. Cowper

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Winn and Widgery JJ.: [1961] 2 W.L.R. 386.[1]

A foxhound had been running wild on common land, and all attempts to catch it had failed. C., coming upon the foxhound whilst it was asleep, and believing that he could not catch it, deliberately shot and killed it.

C. was charged with maliciously killing the foxhound, contrary to section 41 of the Malicious Damage Act, 1861. The justices found that the lambing season had started, and that a stray hound was likely to cause damage to livestock; but that no actual damage was known to have been done by the foxhound. They were of the opinion that C. had acted on the best authority which he could obtain—the authority of a master of a local pack of hounds—and that he had acted reasonably. They accordingly dismissed the information.

Held, allowing an appeal by the prosecutor, that in deciding whether there was lawful excuse for killing a dog, the test was the same whether the shooting was done by an owner in defence of his own property or by a person in defence of another's property: to justify the shooting there must be a real and imminent danger to other animals. [D. C.]

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the prosecutor: *E. D. Sutcliffe, Q.C.*, and *Henry Newman* (instructed by Hyde Mahon & Pascall for Knight & Maudsley, Maidenhead). For C.: *John Wood* (instructed by Simpson, North, Harley & Co. for Collins, Dryland & Thorowgood, Henley-on-Thames).

Commentary. In *Cresswell* v. *Sirl* [1948] 1 K.B. 241 the Court of Appeal held: "(1) The onus of proof is on the defendant to justify the preventive measure of shooting the attacking dogs. (2) He has by proof to establish two propositions, but each proposition may be established in either of two ways: *Proposition No. 1:* That at the time of shooting, the dog was either (*a*) actually . . . attacking the animals in question, or (*b*) if left at large would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented. *Proposition No. 2:* That either (*a*) there was, in fact, no practicable means, other than shooting, of stopping the present attack or preventing such renewal, or (*b*) that the defendant having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack."

In *Goodway* v. *Becher* [1951] 2 All E.R. 349 Lord Goddard C.J. said that although *Cresswell* v. *Sirl* was a civil case it was one which the Divisional Court should follow in criminal matters. This is presumably subject to the modification that there would be no onus of proof on the defendant in a criminal proceeding, who ought to be entitled to an acquittal if he raises a reasonable doubt whether his conduct was not justified.

It does not appear that any argument was advanced that, even if the accused's act was illegal, he should still be entitled to an acquittal because he thought he was entitled to act as he did and therefore lacked the malice which is an essential constituent of the offence. Thus in *R.* v. *Day* (1844) 8 J.P. 186 where the accused was charged with maliciously maiming and wounding four sheep, Lord Abinger directed the jury that "it was no offence within the statute [7 & 8 Geo. 4, c. 30] for a man to do an act which he conceived himself, however erroneously, to be justified by his rights in carrying into execution." And see *R.* v. *Matthews and Twigg* (1876) 14 Cox 5 and *R.* v. *Twose* (1879) 14 Cox 327. No doubt the matter was not raised in the present case because of the more recent decision in *Gott* v. *Measures* [1948] 1 K.B. 234. There Lord Goddard C.J. laid it down that "you cannot have a bona fide claim of right if the right is one which the law does not recognise." This is inconsistent with the notion of claim of right which is accepted in the law of larceny: *R.* v. *Bernhard* [1938] 2 K.B. 264; and *Gott* v. *Measures* has been adversely criticised: *Russell on Crime* (11th ed.), 1583; Edwards, *Mens Rea in Statutory Offences*, 23, and Glanville Williams, *The Criminal Law*, 405. It is respectfully submitted that there is much to be said for Dr. Williams's view that "The criminal law of malicious damage is merely a supplement to the civil remedy, and, as the name 'malicious' implies, it is directed only against those who wantonly interfere with the rights of others. Where the defendant acted under a claim of right, the injured party's civil remedy should be regarded as adequate."

ARREST

Arrest on steps of India House—extent of diplomatic immunity

Dass v. Rennie

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Winn and Lawton JJ.: *The Times*, February 10, 1961.[2]

D. and S. were convicted of obstructing a police officer in the execution of his duty, contrary to section 2 of the Prevention of Crime (Amendment) Act, 1885.

The magistrate found that D. and S. stood on the doorsteps of India House, and distributed leaflets to a crowd in the road. The leaflets annoyed some of the crowd, who threw them down or kicked them aside. The police officer, reasonably fearing a breach of the peace, told D. and S. of this, and asked them to go away; but D. and S. refused, and the police officer arrested them.

It was contended, on appeal, that the doorsteps of India House formed part of India House which was the official premises of the High Commissioner for India, who was entitled to diplomatic immunity; and that D. and S. being on the doorsteps, were beyond the reach of the police, and that the arrest was unlawful and a trespass.

Held, dismissing the appeal, that it was unnecessary to decide whether the arrest was lawful: the real question was whether, before the arrest took place, an offence had been committed; and if a police officer found persons annoying members of the public, and, reasonably apprehending a breach of the peace, told them to stop, and they refused, they were obstructing him in the execution of his duty, even though they were standing in a place where the police officer could not go to arrest them. [D. C.]

Commentary. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction: *Dickinson* v. *Del Solar* [1930] 1 K.B. 376, *per* Lord Hewart C.J. According to Oppenheim, *International Law*, Vol 1, 714, ". . . if a crime is committed inside the house of an envoy by an individual who does not enjoy personally the privilege of exterritoriality, the criminal must be surrendered to the local government." In circumstances like the present then, there would seem to be no doubt that a crime can be committed from the embassy. The accused persons were not entitled to diplomatic immunity and, once out of the embassy, they were clearly subject to the jurisdiction of the court. It is clear that the fact that a man has been unlawfully arrested is no bar to his conviction. In the present case, even if the arrest constituted a trespass against the High Commissioner, it does not follow that the accused would have had any legal complaint.

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[2] For D. and S.: *A. M. Abbas* (instructed by Menassé & Tobin). For the respondent: *Paul Wrightson* (instructed by Solicitor, Metropolitan Police).

DIPLOMATIC IMMUNITY

See DASS *v.* RENNIE, above, page 396.

EVIDENCE

Admissibility—burden of proof that statements were made voluntarily

R. v. Sartori, Gavin and Phillips

Central Criminal Court: Edmund Davies J.: March 2 and 3, 1961.[3]

On an objection to the admission of two of three statements to the police as not being voluntary:

Held, the burden of proof on the prosecution to satisfy the judge that statements were voluntary was the same as that on the prosecution to satisfy the jury of the guilt of the defendants. On the evidence the prosecution had failed to satisfy that burden and the statements were therefore inadmissible.

[C. B. ORR, *Barrister-at-Law*.]

Commentary. Hale laid it down that where the examination of the accused by a justice of the peace or a coroner was tendered in evidence, " it must be testified that he did it freely without any menace or undue terror imposed upon him ": *Pleas of the Crown*, 284. Subsequent cases applied this to confessions of the accused generally: *R.* v. *Warringham* (1851) 2 Den. 447; *R.* v. *Thompson* [1893] 2 Q.B. 12 and *Ibrahim* v. *R.* [1914] A.C. 599 at 609. The importance of the present case is that it lays down, apparently for the first time in any reported case, what is the standard of proof required of the prosecution. It is respectfully submitted that the principle that the prosecution must prove their case beyond reasonable doubt is rightly extended to collateral matters such as the present. Edmund Davies J. similarly expressed the opinion in *R.* v. *Podola* that, where the prosecution raise the issue of fitness to plead, the onus is on them to prove the prisoner's unfitness beyond reasonable doubt; though where the matter is raised by the prisoner the only onus on him is one of proof on a balance of probabilities: [1959] Crim.L.R. 847 at 849.

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[3] For the prosecution: *E. J. P. Cussen* and *M. Corkery* (instructed by the Director of Public Prosecutions). For Sartori: *D. Paiba* (instructed by W. B. Blackwell). For Gavin: *L. J. Solley* (instructed by B. Solley). For Phillips: *D. Miller* (instructed by Pearce & Sons).

Identification—police photographs shown to witness before identification parade

R. v. Lawrenson

Court of Criminal Appeal: Lord Parker C.J., Winn and Widgery JJ.: March 6, 1961.[4]

L. was convicted at assizes of larceny. The case for the prosecution depended upon the identification of L. as the driver of a motor-lorry. A witness, E., had first identified L. as the driver from a number of photographs and had then picked him out at an identification parade. On appeal to the Court of Criminal Appeal, L. argued that (i) counsel for the prosecution had wrongly referred to the photographs seen by E. when opening the case to the jury, and (ii) the trial judge failed to warn the jury that they should not be prejudiced by the fact that the police had a photograph of L.

Held, delivering the appeal, that, if evidence of photographs seen by a witness prior to an identification parade was to be given, it should be done with some care and so that the jury should not be left with, at any rate, a clear impression that the man in question had a criminal record. At the same time, it was very often a point required by the defence, the suggestion so often being that the identification was suspect because the witness had been shown a photograph of the accused with the suggestion that it was the man in question. In the present case, it was quite clear that the defence did rely on his evidence as showing that E.'s identification was suspect. It was said that the trial judge ought to have warned the jury that they must not be prejudiced by the fact that the police had a photograph of this man. However, in the view of this court, it must be left to the discretion of the judge in every case whether to give such a direction or not. There might be many cases, such as the present case, where a warning to the jury would make matters much worse from the prisoner's point of view, in that the jury might well not realise that the photograph produced by the police was a photograph resulting from a criminal record. This court could see no reason to interfere with the conviction and, accordingly, the appeal would be dismissed. [H. P.]

Commentary. ". . . there is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing to persons who are able to identify the criminal a photograph or a series of photographs to see if they can pick out any of them which resembles the person whom they think they would be able to identify. What is objectionable is, if a witness has identified an accused person, for the police to try to corroborate the evidence of that witness by showing him or her a photograph of the actual person whom they have already identified . . .": *R.* v. *Hinds* (1932) 24 Cr.App.R. 6, *per* Avory J., approved by the Court of Criminal Appeal. It was said by Lord Hewart in *R.* v. *Haslam* (1925) 19 Cr.App.R. 59 that where an accused person has already been arrested, it is "indefensible" to allow a witness to study a photograph of the accused before being called on to identify him, for "A person who has seen a photograph of the accused person may identify him simply because he has seen a photograph of him."

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[4] For the appellant: *J. A. S. Hall* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *E. Ryder Richardson, Q.C.*, and *J. F. Evans* (instructed by Lenton, Nester & Co., Walsall).

According to the headnote to *R.* v. *Palmer* (1914) 10 Cr.App.R. 77, "Identification of a suspected person by photograph should be cautiously made. As far as possible, the fact that the photograph of a person on his trial was in the hands of the police should be kept from the jury." In *R.* v. *Wainwright* (1925) 19 Cr.App.R. 52 at 54, Lord Hewart C.J. said "It may well be that if counsel for the defence takes a certain course or asks certain questions, police photographs may have to be produced to the jury. But it is unheard of that police photographs, and the identification of a defendant by means of them, should be put forward by the prosecution as part of its evidence in chief." In that case an album of police photographs was produced to the jury as part of the evidence in chief for the prosecution and two witnesses were required in court again to pick out from that album the photograph of the appellant. In consequence the conviction was quashed.

Identification—recall of prosecution witnesses by the judge—expert evidence of handwriting

R. v. Van Der Vyver

Court of Criminal Appeal: Barry, Hinchcliffe and Winn JJ.: March 21, 1961: *The Times*, March 22, 1961.[5]

V. was convicted at quarter sessions of three offences of obtaining goods by false pretences, the offences in each case having been committed by means of worthless cheques. The prosecution case rested upon the evidence of four witnesses who identified V. as the man who had on the three occasions presented worthless cheques to shopkeepers, but other witnesses failed to identify V. as the man in question. There was no other evidence of any kind connecting V. with the offences. V. gave evidence that he was not the man concerned and called evidence to show that he had been elsewhere at the times of the offences. V. also called a handwriting expert who said that V. could not, in his opinion, have written the fraudulent cheques. On appeal to the Court of Criminal Appeal:

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[5] For the appellant: *Bernard Gillis, Q.C., J. Hutchinson and C. A. R. Nicholls* (instructed by Ludlow, Head & Walter). For the Crown: *John Rogers* (instructed by Mathew, Arnold & Baldwin).

Held, allowing the appeal, that in the circumstances of this case the evidence of the four identifying witnesses was of crucial importance, and it was of the greatest importance that the jury should have been invited to balance that evidence against the evidence called for the defence. The identifying witnesses had, in some cases, qualified their evidence, for example, as to the dissimilarity of the appellant's voice and hair style compared with the man in question. In his summing-up the deputy chairman had tended to minimise these qualifications and had even suggested, contrary to the evidence, that the appellant might have been wearing a wig. The deputy chairman had also tended to minimise the value of the defence evidence and, immediately before dealing with the appellant's evidence, had remarked that more lies had been told in the witness-box than on any other piece of ground in Hertfordshire. In particular, dealing with the evidence of the handwriting expert, the deputy chairman directed the jury that they were entitled to come to an independent view; and although the expert's opinion was adequately put to the jury, there was no sufficient direction as to the facts upon which that opinion was based and upon which the jury themselves would have been entitled to form an independent view. The final matter of complaint was that at the close of the case for the defence, and before defending counsel addressed the jury, the deputy chairman on his own initiative recalled the four identifying witnesses. Each of the witnesses again expressed his conviction that V. was the man in question. It was true that the witnesses might have varied their evidence of identification at that stage, but it seemed to this court much more likely that the effect would be to reinforce the strength of their evidence. A presiding judge clearly had power to recall witnesses in certain circumstances but, as was said in *R.* v. *Sullivan* (1922) 16 Cr.App.R. 121, that course was undesirable where witnesses were recalled solely in order to re-emphasise their previous evidence. Although that was the position in the present case, this court would not have felt justified in interfering with the verdict of the jury on that ground alone. However, on that point coupled with the other matters referred to, the verdict of the jury could not be regarded as a satisfactory one. The conviction would accordingly be quashed on the ground that it could not be supported having regard to the evidence. [H. P.]

Commentary. Identification evidence is notoriously subject to error. *Cf.* Glanville Williams, *The Proof of Guilt* (2nd ed.), 99 *et seq.*

The Court of Criminal Appeal stated in *R.* v. *Dinnick* (1909) 3 Cr.App.R. 77 that it is " a principle of our criminal law . . . that when a defence, however weak it may be, has been raised by a person charged, it should be fairly put before the jury." This "paramount principle" has been constantly acted upon by that court.

Statements—admissibility—Judges' Rules

R. v. Thomas and Cullen

Swansea Borough Quarter Sessions: Mr. Alun T. Davies, Deputy Recorder: January 19, 1961.[6]

The defendants were charged with housebreaking on December 25, 1960. They both made statements admitting the offence and the statements provided the sole evidence against them. Thomas was taken to a police station on the day the offence was committed and, having denied the offence, was released on bail to appear at the police station at 3.30 on December 27. On that day he was questioned from 3.30 p.m. until 6.30 p.m. when he made a statement admitting his guilt. Cullen was then taken to the police station and on hearing that Thomas had made a statement he made a similar statement. The investigating officer conceded, when cross-examined in the absence of the jury, that Thomas was under arrest at 3.30 p.m. on December 27. On a defence submission that the statements should be excluded on the ground that they had been obtained in breach of the Judges' Rules:

Held, that the statements should be admitted.

On further cross-examination in the presence of the jury the investigating officer stated that he and two other officers present during various stages of the questioning were not satisfied that they had obtained the truth: that they wanted to obtain a statement and meant to get a statement. He also agreed that this approach was wrong. In view of these concessions the deputy recorder intimated that he was no longer satisfied that the statements should have been admitted and he directed the jury to return a verdict of not guilty in respect of both accused.

[T. GLANVILLE JONES, *Barrister-at-Law*.]

Commentary. Rule 3 of the Judges' Rules (which provides that "Persons in custody should not be questioned without the usual caution being first administered") "is not intended to encourage or authorise the questioning or cross-examination of a person in custody, after he has been cautioned, on the subject of the crime for which he is in custody, and, long before this rule was formulated and since, it has been the practice for the judge not to allow any answer to a question so improperly put to be given in evidence": Home Office Circular No. 536053/23 of June 24, 1930.

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[6] For the Crown: *T. Glanville Jones* (instructed by J. K. Barrett, Prosecuting Solicitor, Swansea Corporation). For both accused: *Patrick Webster* (instructed by Ivor Evans & Benjamin).

The rules are administrative directions which do not have the force of law, and the fact that a statement is made by a person in custody in answer to a question put to him by a policeman in breach of the rules does not in itself make the statement inadmissible in law. It is however a ground on which the judge may, in the exercise of his discretion, exclude the statement; "but he should do so only if he thinks the statement was not a voluntary one . . . or was an unguarded answer made under circumstances that rendered it unreliable, or unfair for some reason to be allowed in evidence against the prisoner": *R.* v. *Voisin* [1918] 1 K.B. 531 at 539.

It is not entirely clear whether the deputy recorder's initial decision to admit the statements was founded on an opinion that there had been no breach of the rules or on the view that there had been a breach of such a nature that he should exercise his discretion in admitting them; though it seems more likely that the latter was the position in view of the prolonged nature of the questioning. The subsequent decision to exclude the statements illustrates the importance of the rule laid down in *R.* v. *Murray* (1950) 34 Cr.App.R. 203, that counsel for the defence has the right "to cross-examine again, before the jury, the witnesses who have already given evidence in the absence of the jury, because, if he can induce the jury to think that the confession has been obtained by some threat or promise, its value is enormously weakened. The weight of the evidence and the value of the evidence is always for the jury." This right proved to be even more important in the present case, as the cross-examination not merely reduced the value of the confession but secured its entire exclusion.

On police questioning generally, see the special number of the *Criminal Law Review* for May 1960 ([1960] Crim.L.R. 293 *et seq.*). The Lord Chief Justice has agreed that it is now appropriate for the judges to review the scope and operation of the Judges' Rules: [1961] Crim.L.R. 284.

HABEAS CORPUS

Fugitive Offenders Act, 1881, ss. 4, 5 and 29—depositions taken in Canada—refusal of Canadian magistrate to allow cross-examination by accused's counsel

R. v. Governor of Brixton Prison, ex p. Caldough

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Winn and Widgery JJ.: [1961] 1 W.L.R. 464.[7]

A warrant was issued by a Canadian magistrate for the arrest of C. C. was arrested in London on a provisional warrant issued under section 4 of the Fugitive Offenders Act, 1881. Subsequently the Canadian magistrate took depositions from witnesses, and, in so doing, refused to allow C.'s counsel to cross-examine the witnesses, or to take any part in the proceedings. On the warrant and depositions, the Chief Metropolitan Magistrate committed C. to Brixton Prison, to await his return to Canada, under section 5 of the Fugitive Offenders Act, 1881.

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[7] For C.: *Christopher French* (instructed by Rowley Ashworth & Co.). For the Attorney-General of British Columbia: *Victor Durand, Q.C.*, and *J. Mathew* (instructed by Charles Russell & Co.). For the Governor of Brixton Prison: *J. H. Buzzard* (instructed by the Director of Public Prosecutions).

On an application for a writ of habeas corpus, it was contended that the depositions had been taken contrary to law, and that, had they been excluded, there would have been insufficient evidence to justify the committal.

Held, refusing the application, (1) that since it had not been shown that the first paragraph of section 29 of the Fugitive Offenders Act, 1881, was part of the law of Canada, the court could not consider whether what took place in Canada was proper under Canadian law; and that section 29 must be viewed as applying solely to this country; and

(2) that the first and second paragraphs of section 29 were wholly independent provisions, and that " depositions " admissible under the second paragraph were not limited to depositions taken under a procedure which complied with the provisions of the first paragraph: a magistrate in this country was only concerned to see that what was tendered as evidence consisted of depositions as so defined, and that they were duly authenticated. [D. C.]

Commentary. Section 29 of the Fugitive Offenders Act provides " A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him." Section 453 of the Canadian Criminal Code requires a justice holding a preliminary inquiry in the presence of the accused to allow the accused or his counsel to cross-examine the witnesses for the prosecution. It was therefore argued for the applicant that where depositions were taken in Canada for the purposes of the Fugitive Offenders Act in the absence of the prisoner, section 453 required that the accused be allowed to cross-examine through his counsel. In the absence of any evidence that the Fugitive Offenders Act, s. 29, was part of the law of Canada the court declined to embark on a consideration of whether what was done in Canada was proper under Canadian law. Nor are depositions necessarily inadmissible because they have been taken under a procedure which, if the depositions had been taken in England, would not have complied with the provisions of the first paragraph of section 29. The second paragraph of the section which provided " Depositions . . . may . . . be received in evidence in proceedings under this Act " is independent of the first paragraph. The absence of the word " such " indicates that " depositions " in paragraph 2 has the meaning attributed to it (" unless the context otherwise requires ") by section 39: *i.e.*, it includes " any affidavit, affirmation or statement made upon oath as above defined." This is clearly a wider meaning than that attaching to " depositions " in the first paragraph.

HOMICIDE

Murder—defence of diminished responsibility—Homicide (Special Defences) Act, 1959, of the Bahama Islands—direction to jury

Rose v. The Queen

Judicial Committee of the Privy Council: Lords Tucker, Denning and Morris: [1961] 2 W.L.R. 506.[8]

R. was charged before the Supreme Court of the Bahama Islands with murder. The trial judge, in dealing with the defence of diminished responsibility, directed the jury that they were to assess the degree of abnormality of mind in terms of the borderline between legal insanity and legal sanity, as laid down in the M'Naughten Rules.

Section 2 of the Homicide (Special Defences) Act, 1959, of the Bahama Islands (which is in the same terms as section 2 of the English Homicide Act, 1957) provides: "(1) Where a person kills . . . another, he shall not be convicted of murder if he was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility for his acts . . . in doing . . . the killing . . . (3) A person who but for this section would be liable . . . to be convicted of murder shall be liable instead to be convicted of manslaughter."

Held, allowing an appeal against conviction on the ground of misdirection, that if insanity was to be taken into consideration, as would usually be the case, the word must be used in its broad popular sense; the direction to the jury must always be related to the particular evidence; and the words "borderline" and "insanity" might not in some cases be helpful. [D. C.]

Commentary. In *R.* v. *Walden* [1959] 1 W.L.R. 1008; [1959] Crim. L.R. 845, and in *R.* v. *Byrne* [1960] 2 Q.B. 396; [1960] Crim.L.R. 763, the expression "borderline of insanity" was used by English judges. The fatal error in the present summing-up was in equating such insanity with insanity in the very narrow sense of the M'Naughten Rules. In *Byrne* Lord Parker pointed out that the term "abnormality of mind" was "wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment." A man may know the nature and quality of his act perfectly well and be aware that it is wrong in law, and yet be unable to control his physical acts. Such a person in no way borders on insanity within the M'Naughten Rules, yet he should be able to rely on the defence of diminished responsibility.

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[8] For the appellant: *J. T. Molony, Q.C.*, and *D. A. Grant* (instructed by Blyth, Dutton, Wright & Bennett). For the Crown: *Neil Lawson, Q.C.*, and *Mervyn Heald* (instructed by Charles Russell & Co.).

Murder—failure to direct jury on alternative verdict of manslaughter

R. v. Hamilton

Court of Criminal Appeal: Barry, Hinchcliffe and Salmon JJ.: March 13, 1961.[9]

H. was convicted at assizes of murder. The deceased man had been stabbed in the heart by H. during the course of a fight. H. admitted striking the deceased man, but said that he did not realise that he had a knife in his hand. H. appealed to the Court of Criminal Appeal, by certificate of the trial judge, on the main ground that the question of manslaughter had not been left to the jury.

Held, dismissing the appeal, that the trial judge had made abundantly clear to the jury that they should only convict of murder if they were perfectly satisfied that there had been a deliberate stabbing done with the intention of either killing or inflicting really serious injury; and he directed them to acquit if they were not so satisfied. The appellant's case was that the stabbing was accidental and it seemed to this court that the jury could have been directed on the question of the alternative verdict of manslaughter. The jury might have come to the conclusion, contrary to a great deal of evidence, that the facts justified a verdict of manslaughter. However, the appellant could not complain that the alternative verdict of manslaughter was not left to the jury. The jury were directed to acquit unless they were satisfied that there had been a deliberate stabbing accompanied by the necessary intent and, in those circumstances, the summing-up erred, if at all, in favour of the accused. There was ample evidence upon which the jury could find a verdict of murder and, accordingly, the appeal would be dismissed. [H. P.]

Commentary. If the summing-up accurately stated the requirements of murder and directed the jury to acquit if they were not met, the only defect in the summing-up, clearly, was that it might have been too favourable to the accused. If this was a case where the evidence showed that the accused was guilty of murder or nothing, then the summing-up was entirely accurate. If it was a case where the intermediate state of affairs amounting to manslaughter was a possible finding, then the summing-up was unduly favourable to the prisoner.

While this position is logically unassailable, it is possible that, as a practical matter, the prisoner might be prejudiced by the absence of a direction on manslaughter. Take the case of a jury definitely satisfied of facts which would ground a verdict of manslaughter but hesitant about the further facts which would make the crime murder. If the only alternatives which have been put before them are conviction of murder or acquittal, there is at least a possibility that they will convict of murder (especially non-capital murder) where they would have convicted of manslaughter had they been directed that it was open to them to do so.

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[9] For the appellant: *J. A. Grieves, Q.C.*, and *F. A. Allen* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *G. R. Swanwick, Q.C.*, and *R. D. L. Kelly* (instructed by the Director of Public Prosecutions).

MAGISTRATES' COURTS

Change of plea—withdrawal of consent to summary trial—committal for trial

R. v. Bird-Bradsell

Court of Criminal Appeal: Lord Parker C.J., Winn and Widgery JJ.: March 6, 1961.[10]

B. was convicted at quarter sessions of stealing four blank cheques from a bank and also of obtaining a shirt by false pretences, to wit, a worthless cheque. On appeal to the Court of Criminal Appeal, B. alleged that he had consented to summary trial and pleaded guilty in respect of the charge of larceny, so that his subsequent committal for trial to quarter sessions was wrongful.

Held, dismissing the appeal, that leave to appeal had been granted in order that inquiries might be made into what had actually happened. This court has now received a letter from the clerk to the justices, setting out his recollection of these matters, and had also seen the letters passing between the clerk to the justices and B.'s solicitor. It appeared from the information now before this court that B. had initially pleaded guilty to stealing two blank cheques but that he had subsequently withdrawn his consent to summary trial and changed his plea. In those circumstances B. had been properly committed for trial and the appeal would accordingly be dismissed. [H. P.]

Commentary. The question whether a plea can be withdrawn is entirely one for the court which is not bound to allow a plea to be withdrawn once it has been made: *R.* v. *McNally* [1954] 1 W.L.R. 933 at 934; [1954] Crim.L.R. 631 at 632, *per* Lord Goddard C.J. But this discretion terminates as soon as the case has proceeded as far as conviction: once a magistrate has heard and determined a case and convicted he is *functus officio* and has no power to allow the plea to be changed: *R.* v. *Campbell, ex p. Hoy* [1953] 1 Q.B. 585. A conviction is complete as soon as it is announced in court by the magistrate, notwithstanding that no entry has been made in the register nor any sentence imposed: *R.* v. *Sheridan* [1937] 1 K.B. 223. Presumably, in the present case, B withdrew his plea before matters had proceeded so far.

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[10] For the appellant: *S. I. R. Craig* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *W. G. Fordham* (instructed by the Solicitor, Metropolitan Police).

Magistrates' Courts Act, s. 104—failure to comply with planning enforcement notice—continuing offence—certiorari in case of an oral order

R. v. Chertsey JJ., ex p. Franks

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Winn and Widgery JJ.: [1961] 2 W.L.R. 442.[11]

A farmer, who failed to comply with an enforcement notice, was convicted of an offence under section 24 (3) of the Town and Country Planning Act, 1947. He continued to fail to comply with the notice, and was again convicted on July 2, 1958. As he still continued to fail to comply, a further information was laid against him on November 13, 1959. The justices, hearing the information on March 9, 1960, fined the farmer £1,338, stating that they would impose a fine at the rate of £3 a day from the date of the last conviction. The notice of the fine did not disclose the basis of the fine.

Held, allowing an application for certiorari, (1) that the justices were precluded by section 104 of the Magistrates' Courts Act, 1952, from hearing the information in so far as it alleged an offence occurring six months before its date; and (2) that where the decision of the justices was announced orally, it was the oral order, and not the written register of conviction, which an applicant for certiorari must seek to quash; and that the oral decision in the present case was a speaking order, giving reasons, which disclosed an error of principle. [D. C.]

Commentary. In spite of the court's describing the offence in this case as a continuing one, it would seem that they, in effect, held that the accused committed a new offence each day that he continued the forbidden use of the land. As the court said: ". . . the local planning authority's insistence on the offence being one and indivisible is inconsistent with the local planning authority's own view—which we accept—that the conviction of Dec. 17, 1958, did not present the applicant with a defence of *autrefois acquit* when the information of Nov. 13, 1959, was heard." In the case of a true continuing offence it would seem that the defence of *autrefois acquit* would have been available: *Edwards* v. *Bull* (1956) 54 L.G.R. 338; [1956] Crim.L.R. 416.

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[11] For the applicant: *Douglas Frank* (instructed by Sharpe, Pritchard & Co. for Horne, Engall & Freeman, Egham). For the local authority: *Neil McKinnon, Q.C.*, and *Jeremiah Harman* (instructed by Champion & Co.).

MERCHANDISE MARKS

Merchandise Marks Act, 1887, s. 2 (as amended)—meaning of possession of goods—bailment

Towers & Co., Ltd. v. Gray

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Winn and Widgery JJ.: [1961] 2 W.L.R. 553.[12]

The appellant company bought from a farmer a quantity of frozen chickens, each wrapped in a cellophane bag inside which the weight of the chicken was marked, and stored them in a cold store belonging to another company, under an agreement which gave the cold storage company a general lien on the goods for any storage charges due from the appellant company and gave the appellant company a right to withdraw the goods on demand. It came to the knowledge of the appellant company that the weights marked on the chickens were inaccurate as the farmer's scales were faulty. They gave certain instructions to their depot manager but did not arrange for individual reweighing. On June 10, 1960, an inspector of weights and measures weighed some of the chickens and the weighing took place, by agreement, at the cold store. Thirty-nine chickens were found to weigh less than the marked weight and the appellant company was charged with having in their possession for the purpose of trade thirty-nine chickens to which a false trade description applied contrary to section 2 (2) of the Merchandise Marks Act, 1887, as amended by section 4 of the Merchandise Marks Act, 1953. The company was convicted and fined, the justices being of opinion that they were in constructive possession of the chickens in question. On appeal by way of case stated:

Held, (1) that " possession " must be given its popular meaning in the particular context in which it was used, and in a penal statute dealing with sellers of goods it must be looked at from the point of view of the criminal law and of the commercial community and it would cover a case where goods were held by a bailee to the order of the seller on terms on which he could recover them on demand.

(2) that he words " has in his possession for sale, or any purpose of trade " in section 2 (2) were not mutually exclusive and therefore the information was properly laid, and the appeal would be dismissed.

[MRS. E. M. WELLWOOD, *Barrister-at-Law*.]

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[12] For the appellant company: *Joseph Dean* (instructed by Linklaters & Paine). For the respondent: *Paul Wrightson* (instructed by Field, Roscoe & Co. for the Town Clerk, Leicester).

Commentary. It was not without justification that Erle J. described "possession" as one of the most vague of all vague terms "which shifts its meaning according to the subject-matter to which it is applied —varying very much in its sense as it is introduced either into civil or into criminal proceedings" (*R.* v. *Smith* (1855) 6 Cox 554). Possession is a concept which has given rise to endless difficulty in many branches of the law.

". . . the essence of bailment is that the bailee secures possession and that therefore the bailor loses possession": Paton, *Bailment*, 6. "To constitute a contract of bailment . . . the actual or constructive possession of a specific chattel must be transferred by its owner or possessor (the bailor) or his agent duly authorised for that purpose, to another person (the bailee) . . .": *Halsbury's Laws of England* (3rd ed.), Vol. 2, 94. These propositions would seem to make it clear that the bailor, by definition, cannot be in possession of the bailed goods and this indeed is the view held by distinguished jurists: see Holmes, *The Common Law*, 174–5 and Winfield, *Province of the Law of Tort*, 101–2. There are, however, some authorities which suggest that, where the bailor can at any moment demand the return of the object bailed, he retains possession through the bailee, so that both are possessors. See *Ancona* v. *Rogers* (1876) 1 Ex.D. 285, at 292, *per* Mellish L.J.; *Dollfus* v. *Bank of England* [1950] 1 Ch. 333 at 351, *per* Evershed M.R.; *U.S.A.* v. *Dollfus Mieg et Compagnie S.A.* [1952] A.C. 582 at 611, *per* Lord Porter.

The court in the present case seems to have taken a view similar to that to be found in the latter group of authorities. It shows that possession, as utilised by the courts, is a variable concept, the precise nature of which differs according to the particular problem which requires solution. Thus it is clear that in circumstances like those of the present case, the bailor could be convicted of larceny from the bailee if he took the bailed goods from him, fraudulently and without a claim of right: *Rose* v. *Matt* [1951] 1 K.B. 810. In giving such an answer to that problem, the court would necessarily be holding that, for that purpose, the bailee only, and not the bailor, had possession. Such a situation is inevitably confusing and, in the law of larceny, lends itself to the criticism that "there has been a tendency, inspired by moral disapproval of obviously dishonest conduct, to adopt whatever theory of possession will enable the conviction of the accused person to be upheld": Kenny, *Outlines of Criminal Law* (17th ed., by J. W. C. Turner), 286. Nevertheless, it is thought that this approach to the construction of a statute which takes account of the mischief at which it is aimed, is preferable to the narrow technical approach, involving the view that a word has only one fixed and unalterable meaning in the law, to be found in other recent cases.

For example, in *Fisher* v. *Bell* [1960] 3 W.L.R. 919; [1961] Crim.L.R. 180 the court held that any statute must be looked at in the light of the general law of the country and that Parliament must be taken to have known, when passing an Act, how the law had interpreted certain words. Consequently the word "offer" was construed in the narrow sense in which it is used in the "ordinary law of contract," although Lord Parker thought the result an absurd one and it has necessitated amending legislation to cover the mischief at which the Act was obviously aimed. Not only was the ordinary, popular meaning of the word "offer" ignored in that case, but the court failed to advert to the fact that that word has been given a wider meaning in other statutes than that which it bears in the law of contract. Thus, section 45 of the Companies Act, 1948, provides that any document containing an offer of shares or debentures for sale is to be deemed a prospectus; yet it is well settled that "When shares or debentures are offered by a prospectus, the prospectus is merely an invitation to investors to subscribe. It does not contain an offer which they can accept, because it does not contain all the terms of the proposed contract" (Pennington, *Company Law*, 194). In other words, that statute uses the word "offer" in a wide sense to cover what in the law of contract is no offer but an "invitation to treat."

OFFENSIVE WEAPONS

Prevention of Crime Act, 1953—mens rea—knowingly in possession of a weapon

R. v. Cugullere

Court of Criminal Appeal: Lord Parker C.J., Gorman and Salmon JJ.: April 17, 1961.[13]

C. was convicted at quarter sessions, *inter alia*, of possessing an offensive weapon in a public place. C. had been found driving a motor-van, in the back of which were three pickaxe handles bound with adhesive tape. At the trial C.'s defence was principally that he did not know that the pickaxe handles were in the back of the van. The jury were directed: "He [the appellant] was in possession. . . . What he is saying is that he had reasonable and lawful excuse for being in possession because it was innocent possession. . . ." On appeal to the Court of Criminal Appeal:—

Held, allowing the appeal, that the words of the Act "has with him in any public place" meant "knowingly has with him in any public place." Accordingly, the first thing which the jury had to be satisfied about was whether the accused person knowingly had with him the alleged offensive weapon. In the present case, the real question for the jury was: Did C. know that these pickaxe handles were in the back of the van? The jury were not directed that, unless they were satisfied beyond reasonable doubt on the question of possession, they should acquit. The burden of proof remained on the prosecution throughout to prove that the accused man was knowingly in possession, and the jury had been misdirected on this issue. The summing-up was also open to criticism on the ground that there was no direction on the meaning of "offensive weapon." This court had dealt with this aspect in *R.* v. *Petrie* [1961] 1 W.L.R. 358; [1961] Crim.L.R. 264, and it was unnecessary to repeat the observations made in that case. This conviction could not, therefore, be allowed to stand. [H. P.]

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[13] For the appellant: *Colin Nicholls* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Miss N. M. Collins* (instructed by the Solicitor, Metropolitan Police).

Commentary. "All that the word 'knowingly' [in a statute] does is to say expressly what is normally implied": *Roper* v. *Taylor's Garages (Exeter), Ltd.* [1951] 2 T.L.R. 284 at 288, *per* Devlin J. The courts have been by no means consistent in the application of this principle and, indeed, they depart from it whenever they hold a statutory offence to be one of strict liability. Donovan J. recently asserted in *R.* v. *St. Margaret's Trusts, Ltd.*, 42 Cr.App.R. 183; [1958] Crim. L.R. 390 that "there is no universal presumption of *mens rea*." In that case the court held that any presumption in favour of *mens rea* was rebutted by the seriousness of the economic situation with which, in the view of the court, the legislation was intended to deal, and by the necessity for making that legislation effective. Such an approach makes it difficult to predict how any new clause will be interpreted. The present section is discussed by Mr. Ian Brownlie in [1961] Crim.L.R. 19 at 25 who concludes: ". . . it would seem reasonable to demand knowledge unless, as is unlikely, the policy of the law is so strict that the mere presence of a weapon on a person in a public place constituted a danger although no one is likely to use it." That such a conclusion was by no means inevitable, however, is shown by the cautious approach of the court to a similar problem arising under the Dangerous Drugs Regulations, 1953, where the question whether possession must be accompanied by *mens rea* was left open: *R.* v. *Carpenter* [1960] Crim. L.R. 633; [1960] Crim.C. & C. 58. It is respectfully submitted that, for the reasons given by Mr. Brownlie, the right conclusion was reached in the present case.

ROAD TRAFFIC

Vehicles (Excise) Act, 1949, ss. 13 (2), 27 (1)—whether vehicle adapted for use for the conveyance of goods—a question of fact

Taylor v. Mead

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Winn and Lawton JJ.: [1961] 1 W.L.R. 435.[14]

A commercial traveller used a saloon car, in the rear of which there was a rail running across the width of the car secured to the rear door pillars by two screws. Attached to that cross rail were two other rails running to the end of the car and screwed to a bracket behind the rear seat. On those rails were suspended ladies' dresses and other articles of clothing. There was no addition or alteration to the interior of the car other than those rails. When there were no samples in the car, passengers could sit in the rear seat.

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[14] For the prosecutor: *Raymond Stock* (instructed by Sharpe, Pritchard & Co. for A. Lindsay Clegg, Bournemouth). For the commercial traveller: *Herrick Collins* (instructed by Rollit, Sons & Haydon).

The car was taxed as a private car, but if at the material time it was adapted and used for the conveyance of goods, a higher rate of duty was chargeable.

The commercial traveller was charged with using the car for a purpose which rendered it liable to a higher rate of duty before such duty was paid, contrary to section 13 (2) of the Vehicles (Excise) Act, 1949.

The justices were of the opinion that the car was not " constructed or adapted for use . . . for the conveyance of goods " within the meaning of the definition of goods vehicle in section 27 (1) of the Act, and dismissed the information.

Held, dismissing an appeal, that the words " constructed or adapted for use " connoted some adaptation of the structure of the vehicle, and meant " originally constructed or where the structure is subsequently altered," importing the question whether, in the ordinary sense of the words, the structure of the vehicle had been altered or whether the structure remained the same, but some attachment had been made which, though involving the making of screw holes, could not be said to be an alteration ; and that the question was one of fact and degree to which the justices had applied their minds. [D. C.]

Commentary. The court did not decide as a fact that the vehicle was not constructed or adapted for the conveyance of goods. As Lord Parker said, " It is not a question of what any of us sitting here would have found on the facts, but merely whether it is possible to say that this decision was perverse, and that the justices, properly directing their minds to the question must have come to an opposite conclusion, namely that an offence was made out." There was evidence on which the magistrates could find as they did.

SEXUAL OFFENCES

Sexual Offences Act, 1956, s. 32—soliciting—whether an advertisement in a shop window constitutes persistent soliciting

R. v. Burge

County of London Sessions Appeals Committee: Chairman: R. E. Seaton: March 10, 1961.[15]

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[15] For the appellant: *Robin Simpson* (instructed by Christopher Frere-Smith). For the Crown: *John Streeter* (instructed by the Director of Public Prosecutions).

B. was appealing from a conviction under section 32 of the Sexual Offences Act, 1956, of persistently soliciting in a public place for immoral purposes. He had had inserted a card in a shop window advertising his " services." Did this constitute " persistent soliciting "? It was contended on behalf of the appellant that the meaning of the word solicit in section 32 of the 1956 Act is to invite by word or gesture, and that at least the physical presence of the person soliciting is essential; that the word solicit in section 32 clearly bears the same meaning as the word solicit in the Street Offences Act, 1959; and that in neither Act does it mean merely to " advertise." The mischief which the 1959 Act was designed to remedy was the molesting or annoying of passers-by in the street by prostitutes, not simply the sight of a card advertising " services " in a shop window.

This construction of the word solicit as used in both Acts is supported by the decision of *Smith* v. *Hughes* [1960] 1 W.L.R. 830; [1960] Crim L.R. 709, where Lord Parker C.J. emphasised the mischief which the 1959 Act was designed to remedy. Further support for this restricted meaning is derived from the *Oxford Dictionary*, where the meaning of the word solicit, when used in relation to a " woman soliciting for immoral purposes," is to " accost."

On the question of persistence it was argued on behalf of the appellant that as there was no evidence as to how long the card had been in the window before the police saw it there, there was no evidence of persistent soliciting. It might have only been inserted 30 seconds before the police arrived.

Held, that it was the ordinary everyday meaning of the word which must be followed. Looking at the preamble to the Street Offences Act, 1959, accosting was merely one form of solicitation. The judgment of Lord Parker C.J. in *Smith* v. *Hughes* did not help the appellant since the Lord Chief Justice did not have the instant facts in mind when dealing with the matter before him. Here the advertisement clearly showed that the appellant was holding himself out as prepared to act in homosexual offences, and this advertisement constituted " soliciting " in the ordinary sense of that word. He was soliciting business. On the question of persistence, it would be a persistent soliciting even if it could be shown that the card had only been in the window for half an hour. Here the reasonable inference was that it had been there for longer than that. The appeal was therefore dismissed.

[R. E. AULD, *Barrister-at-Law.*]

Commentary. Some of the criticism which was levelled at *Smith* v. *Hughes* (above) was based on the assumption that it followed from that decision that the display of advertisements in a public place would also amount to soliciting. Since that decision was expressly based on the mischief at which the 1959 Act is aimed, it is reasonable and proper that the effect of the decision itself should be held to be limited by the mischief of the Act. From this point of view it is thought that there is much to be said in favour of the argument of counsel for the appellant. The point should still be open under the 1959 Act, which was aimed at a particular mischief, and its words should be construed accordingly.

The meaning of "persistent" in this kind of situation is obviously not easy to define. It has been said that under the Summary Jurisdiction (Married Women) Act, 1895, "the epithet 'persistent' necessarily implies some degree of repetition": *Barker* v. *Barker* [1949] P. 219, *per* Merriman P. This is reasonable in the case of personal solicitation in a street, but a notice might be displayed for years on end without any repetition. Such a display obviously ought to be held to be sufficient. But how is the line to be drawn between that and counsel's case where the notice has been displayed for 30 seconds only? The answer of the court, perhaps, would be that no line is to be drawn and that 30 seconds is enough; but this would seem to render the word "persistent" meaningless.

TOWN AND COUNTRY PLANNING

Failure to comply with enforcement notice—continuing offence

See R. *v.* CHERTSEY JJ., *ex p.* FRANKS, above, p. 407.

TRIAL

Recall of prosecution witnesses by the judge

See R. *v.* VAN DER VYVER, above, p. 399.

Summing-up—directions to convict—uncontradicted evidence

R. v. Eastwood

Court of Criminal Appeal: Hilbery, Edmund Davies and Lawton JJ.: February 27, 1961.[16]

E. was indicted on two counts in an indictment, one charging wounding with intent to murder his wife and the other charging wounding with intent to do grievous bodily harm. At the trial the uncontradicted evidence was that E. had caused severe injuries to his wife by striking her with a knife in the street and in circumstances in which the use of the knife was unlawful. The trial judge directed the jury that they must find E. at least guilty of unlawful wounding. The jury acquitted E. of the offences charged but convicted him of unlawful wounding. On appeal to the Court of Criminal Appeal:

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[16] For the appellant: *Z. Vardy* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *John Mathew* (instructed by the Director of Public Prosecutions).

Held, dismissing the appeal, that the direction complained of was not a direction telling the jury how to find facts. The uncontradicted facts were that there was a wounding by this man of his wife without lawful excuse. The evidence was all one way and it was not open to the jury to find anything less than unlawful wounding, the jury being sworn to decide the issue before them in accordance with the evidence. The authority for saying that was *R.* v. *Larkin* (1942) 29 Cr.App.R. 18. In such circumstances the direction to convict at least of unlawful wounding was perfectly proper and the appeal would, therefore, be dismissed. [H. P.]

Commentary. The jury in a criminal case has what Devlin L.J. has called " the sovereign power of acquittal." The defence can never be withdrawn from the jury. They must give their verdict, which they cannot be required to explain and, if it is a verdict of acquittal, it is the last word even if it is such that it must necessarily be contrary to law. See *Trial by Jury*, 89–90.

A judge may comment on the facts but he must not direct the jury that they must find the facts in the way in which he indicates: *R.* v. *O'Donnell* (1917) 12 Cr.App.R. 219. In *R.* v. *Larkin* (above) the court held that where facts are proved and accepted, it is a question of law, not of fact, whether those facts amount to a crime. In such a case, it is perfectly proper for the judge to tell the jury that those facts amount to a lawful or an unlawful act as the case may be. In *Larkin*, even if the accused's evidence was accepted in full, he was, in law, guilty of manslaughter and the court therefore held that it was perfectly proper for the judge to tell the jury that it was not open to them to return a verdict of not guilty. The situation in the present case would seem to be the same. Of course, if a jury, after such a direction, does acquit, nothing can be done about it. But probably juries are unaware of this.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Assault occasioning actual bodily harm

In R. *v.* PAYNE the court (Lord Parker C.J., Gorman and Salmon JJ.: April 17, 1961) varied a sentence of borstal training, expressed to commence at the expiration of a sentence of imprisonment then being served, to a sentence of borstal training to commence immediately. P., who was a young man of eighteen years of age, had four previous convictions. The Prison Commissioners reported that P.'s conduct, during a previous period of borstal training, had shown great improvement and that they would be prepared to recall him to such training and to receive him for fresh training. Lord Parker C.J., giving judgment, said that it seemed that P. would benefit from a further sentence of borstal training. However, it was wrong to impose such training following a sentence of imprisonment and, accordingly, the sentence would be varied so that the training would commence immediately, thus absorbing the unexpired portion of the sentence of imprisonment.

Dangerous driving

In R. *v.* TAYLOR the court (Stable, Ashworth and Widgery JJ.: April 13, 1961) reduced a period of disqualification from driving from twenty years to five years in the case of a man of twenty-four years of age with previous convictions. Stable J., giving judgment, said that disqualification for twenty years might be a very proper order where the offender was from some obvious inherent cause quite unfit to drive a motor-car. However, dealing with a young man of twenty-four, one could hope that he would learn sense and take his lesson to heart. The appropriate period of disqualification was five years.

False pretences

In R. *v.* AUSTIN the court (Lord Parker C.J., Barry and Hinchcliffe JJ.: March 27, 1961) reduced a sentence of five years' imprisonment for offences of false pretences on the ground that five years was the maximum and there might be worse cases. The offences were committed by obtaining money and goods by means of worthless cheques. Lord Parker C.J., delivering judgment, said that the appellant had a record for fraud and dishonesty and had been bound over, placed on probation, and served three terms of imprisonment. However, the sentence of five years was wrong in principle, in the sense that it did not allow for what might be far worse cases of false pretences, for which the maximum of five years' imprisonment would be a proper sentence. The appropriate sentence in the present case was one of three years' imprisonment.

Housebreaking

In R. *v*. SHEPHERD the court (Stable, Ashworth and Widgery JJ.: April 11, 1961) varied a sentence of three years' corrective training to one of three years' imprisonment in the case of a man of twenty-two years of age with previous convictions. Ashworth J., giving judgment, said that the Prison Commissioners had reported, in the barest possible form, that as S. had been on bail his suitability for corrective training could not be assessed, but that his age and record seemed to indicate that he might benefit from a period of training. In the view of the court, a report in such meagre terms was not a sound basis to enable a sentence of corrective training to be imposed. The number of cases in which corrective training was the appropriate sentence was limited and such a sentence should not be imposed merely because the offender had the necessary qualifying convictions, nor because the offender needed some sort of training to remind him that crime did not pay. Corrective training was not justified in the present case on the information before the court and, accordingly, the sentence would be varied to one of three years' imprisonment.

Larceny

In R. *v*. PHILIPSON the court (Lord Parker C.J., Winn and Widgery JJ.: February 13, 1961) affirmed a sentence of ten years' preventive detention for larceny and false pretences in the case of a man with a long mental history. The medical evidence showed that P., although he had been living a life of fantasy, was not certifiable. Lord Parker C.J., giving judgment, said that the sentence of preventive detention was fully justified for the protection of the public. No harm could be done to P. as he could be transferred to hospital and, if he responded to treatment, be released on licence under the provisions of the Mental Health Act, 1959.

Receiving

In R. *v.* REYNOLDS the court (Lord Parker C.J., Barry and Hinchcliffe JJ.: March 28, 1961) reduced a sentence of three years' imprisonment for receiving stolen property to one of twelve months' imprisonment. The offence concerned radio sets to the value of £340 and two similar offences were taken into consideration involving further property to the value of £260. The trial judge took the view that R. was a professional receiver. Barry J., giving judgment, said that there was no evidence that R. was a professional receiver. He had only one previous conviction in 1953 for factory-breaking and larceny. Since then his character had been exemplary and his work record good, which seemed to indicate that he was not in fact a professional receiver. The sentence of three years' imprisoment was excessive, but dealing in stolen property was a serious offence and the appropriate sentence was one of twelve months' imprisonment.

Shopbreaking

In R. *v.* RAYNER the court (Lord Parker C.J., Gorman and Salmon JJ.: April 17, 1961) reduced sentences totalling eight years' imprisonment for shopbreaking and other offences to four years' imprisonment in the case of a man of thirty-six years of age with a bad record on the grounds that (i) for nearly a year prior to the present offences he had held down a job; and (ii) all the offences were committed during the period of three weeks immediately after the death of his baby, when he had gone "completely to pieces." In the circumstances the court felt entitled to make a considerable reduction in the sentence.

Store-breaking

In R. *v.* CLAYTON AND OTHERS the court (Lord Parker C.J., Barry and Hinchcliffe JJ.: March 27, 1961) approved sentences of three years' imprisonment imposed on each of four boys, three being sixteen years of age and one fifteen years of age. The appellants pleaded guilty of store-breaking and larceny and asked for twenty-three other offences to be taken into consideration. Lord Parker C.J., giving judgment, said that this case raised a question of principle as to whether these four boys (of whom three were eligible and recommended for borstal training) should be sent to prison. All the appellants had many previous convictions and were frequent absconders from their approved schools. The present offences were committed whilst "on the run" from an approved school. This court considered that this was such a bad case that exemplary punishment ought to be imposed in the circumstances and as a deterrent to others. Accordingly, the sentences of three years' imprisonment would stand.

Unlawful sexual intercourse with girl under sixteen

In R. *v.* TIPPLE the court (Lord Parker C.J., Finnemore and Salmon JJ.: April 11, 1961) reduced a sentence of nine months' imprisonment to one of probation for two years in the case of a man of twenty-one years of age. Lord Parker C.J., giving judgment, said that this sort of offence was very prevalent today; but T. had been "walking out" with this girl for about two years, there had been talk of marriage and this did seem to have been a boy and girl affair. In the circumstances the appropriate sentence was one of probation.

Unlawful wounding

In R. *v.* TUCKER the court (Hilbery, Stevenson and Lawton JJ.: April 11, 1961) reduced a sentence of ten years' preventive detention for unlawful wounding in the following circumstances. T., who was a man of thirty-five years of age, had seven previous convictions involving violence. The assault took place during the course of a dock strike, when T. was one of those out on strike and the complainant was not. T. struck one blow with his fist on the complainant's eye. Hilbery J., giving judgment, said that the assault occurred in circumstances in which feelings were undoubtedly running high between those who were out on strike and those who were not. It was very right that in such circumstances severe sentences should be given for acts of violence, but it was not the appropriate moment in T.'s career to say that the public must be protected against him as a persistent offender. The appropriate sentence was one of three years' imprisonment.

Acts and Orders *

Agricultural Employment

By virtue of the principal Regulations (S.I. 1956, No. 445 as amended) workers to whom the Regulations apply may not, and their employers may not cause or permit them to, carry out certain scheduled operations with the poisonous substances specified in the Regulations unless the prescribed safety measures, including the wearing of protective clothing are observed. These Regulations now add to the specified substances four further poisonous substances listed in the Schedule to this Order. There are certain further minor changes. Operative April 6, 1961. AGRICULTURE (POISONOUS SUBSTANCES) AMENDMENT REGULATIONS, 1961 (S.I. No. 626) (3d.).

For penalties for contraventions, see section 4 of the Agriculture (Poisonous Substances) Act, 1952.

Animals

The Slaughter of Animals (Prevention of Cruelty) Regulations, 1958 (S.I. 1958, No. 2166) and the Slaughterhouses (Hygiene) Regulations, 1958 (S.I. 1958, No. 2168), which otherwise became operative January 1, 1959, provided for the deferment of certain requirements relating to the construction, layout and equipment of existing slaughterhouses until such later dates as the Minister might appoint. This Order specifies April 1, 1961, as the date on which such provisions shall come into operation in certain local authority areas set out in the Schedules to these Orders. SLAUGHTER OF ANIMALS (PREVENTION OF CRUELTY) REGULATIONS (APPOINTED DAY) ORDER, 1961 (S.I. No. 443) (3d.); SLAUGHTERHOUSES (HYGIENE) REGULATIONS (APPOINTED DAY) ORDER, 1961 (S.I. No. 444) (3d.).

Wild birds included in the Second Schedule to the Protection of Birds Act, 1954, may be killed or taken at any time by the owner or occupier of the land where the action is taken, or by any person authorised by them or by certain public bodies, and the eggs of those birds may be taken. The bullfinch is now added to the Second Schedule in the areas specified in the Schedule to this Order, which areas include the administrative counties of Bedford,

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* Prepared by F. Maurice Drake, Barrister-at-Law.

Buckingham, Berkshire, Cambridge, Dorset, Gloucester, Hampshire, Oxford, Suffolk, East and West, and Warwick, and some adjoining areas. Operative April 1, 1961. WILD BIRDS (BULLFINCHES) ORDER, 1961 (S.I. No. 482) (3d.).

Any offence under the Protection of Birds Act, 1954, against the collared dove or its eggs, in Scotland is made subject to the special penalties provided in the Act for serious offences. Operative April 15, 1961. WILD BIRDS (COLLARED DOVES) (SCOTLAND) ORDER, 1961 (S.I. No. 690) (2d.).

Betting and Gaming

See under **Scotland,** below, p. 424.

Children and Young Persons

The contributions to be made by the local authority named in an approved school order to the expenses of the managers of an approved school during the time, except in special circumstances, for which the person to whom the order relates is under the care of the managers, are raised from £5 1s. 6d. to £5 17s. 3d. per week. Previous Regulations (S.I. 1959, No. 548 and 1960, No. 551) are amended accordingly. Operative April 1, 1961. APPROVED SCHOOLS (CONTRIBUTIONS BY LOCAL AUTHORITIES) REGULATIONS, 1961 (S.I. No. 558) (2d.).

The Lambeth Juvenile Court is transferred from Lambeth Town Hall to the Methodist Church Hall, Elm Park, Brixton Hill, S.W.2, and will sit on Wednesdays and Fridays at 10 a.m., from April 5, 1961. JUVENILE COURTS (LONDON) ORDER, 1961 (S.I. No. 576) (2d.).

Civil Aviation

The provisions of the Civil Aviation (Licensing) Act, 1960 (8 & 9 Eliz. 2, c. 38), are extended, with modifications, to the Channel Islands and the Isle of Man. Operative March 30, 1961, save for section 7 of the Act which becomes operative for these purposes on January 1, 1962. CIVIL AVIATION (LICENSING) ACT, 1960 (CHANNEL ISLANDS) (ISLE OF MAN) ORDERS, 1961 (S.I. Nos. 574, 575) (each 3d.).

Food and Drugs

Section 37 (1) of the Food and Drugs Act, 1955, relating to the compulsory use of special designations for retail sales of milk in any area in England and Wales in respect of which the Minister of Agriculture, Fisheries and Food makes an Order, is brought into operation in the areas specified in the Schedule to the Order. These areas, which are specified exactly in the Schedule, are in the region of and include (1) the Boroughs of Lancaster, and Morecambe and Heysham, Carnforth and neighbouring Rural Districts; (2) Buxton, Alfreton, Ashbourne, Belper, Bakewell, Heanor, Ripley and neighbouring districts and parishes; (3) Cirencester, North Cotswold, Northleach and neighbouring areas; (4) Betws-y-Coed, Llanrwst and the Rural Districts of Hiraethoy and North Conway; (5) Lampeter, Aberayron, Newcastle Emlyn, New Quay and neighbouring Rural Districts; (6) the Borough of Brecon, Llanwrtyd Wells, and the Rural Districts of Brecknock and Builth. Operative April 10, 1961. MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) ORDER, 1961 (S.I. No. 530) (3d.).

For penalties for contraventions, see section 106 of the Food and Drugs Act, 1955.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 451 (Coulsdon and Purley) (3d.); 452 (Harrow) (2d.); 453 (Hextable, Kent) (2d.); 517 (Brentford and Chiswick) (2d.); 600 (Bermondsey) (3d.); 636 (Rickmansworth) (3d.).

The following Orders have been made imposing a speed limit of 40 m.p.h. on certain lengths of road: S.I. No. 547 (Folkestone–Dover Trunk Road (A.20) at Swanley) (2d.); 638 (Court Road, Orpington) (2d.).

The following Orders have been made prohibiting waiting: S.I. Nos. 546 (Redhill and Reigate) (3d.); 637 (Rickmansworth) (3d.).

The following Order restricts the driving of a vehicle (other than a perambulator, hand cart, invalid carriage, or a bicycle or tricycle pushed by hand) on a specified length of Stork Lane, Wilmington, Kent. LONDON TRAFFIC (RESTRICTIONS ON DRIVING) (WILMINGTON, KENT) REGULATIONS, 1961 (S.I. No. 601) (3d.).

For penalties for contraventions, see paragraph 4 of the Order.

The principal Order has been amended, the principal changes being (1) that traffic wardens instead of parking attendants are authorised to perform certain functions previously performed by parking attendants, and the Commissioner of Police of the Metropolis is given some of the powers previously conferred on the St. Pancras Borough Council; and (2) the area of three of the parking places is altered. Both operative March 20, 1961. PARKING PLACES (ST. PANCRAS) (NO. 1, 1960) (AMENDMENT) and (AMENDMENT NO. 2) ORDERS, 1961 (S.I. Nos. 423, 424) (each 3d.).

Mental Health

See under **Scotland,** below, p. 425.

Merchant Shipping

The Republic of Haiti has acceded to the Load Line Convention, and this Order makes a declaration accepting the fact. MERCHANT SHIPPING (LOAD LINE CONVENTION) (HAITI) ORDER, 1961 (S.I. No. 586) (2d.).

The Load Line Rules, 1959 (S.I. No. 2238) are amended by designating the British Committee of Det Norske Veritas as an Assigning Authority. Operative April 6, 1961. LOAD LINE (AMENDMENT) RULES, 1961 (S.I. No. 599) (2d.).

Pests

It is prohibited to land in Great Britain any unbarked timber in the round from trees of any of the coniferous species grown in or brought from Belgium, Denmark, the Federal Republic of Germany and the Netherlands. Subsidiary provisions of this Order relate to the procedure when such timber is landed in contravention of the Order, and certain powers of entry and examination are conferred on authorised officers of the Forestry Commission. Operative April 24, 1961. LANDING OF UNBARKED CONIFEROUS TIMBER ORDER, 1961 (S.I. No. 656) (3d.).

For penalties for contraventions see Regulation 6 of the Order.

Police

Regulations made under the provisions of the Police Pensions Act, 1948, amend earlier Regulations by (1) increasing the amount by which widows' pensions may be increased in those cases in which discretionary increases are permitted (Regulations 2, 4, 7, 8, 13 and 14); (2) making similar provision in relation to children's allowances (Regulations 6, 12, 20 and 21) and (3) adjusting the extent of the abatement of a widow's pension by a national insurance widowed mother's allowance. Regulations made under section 11 of the Police (Scotland) Act, 1956, make similar provisions with regard to awards to widows and children of special constables in Scotland, and also provide for increases in the pensionable pay of special constables. All operative April 3, 1961. POLICE PENSIONS (AMENDMENT) REGULATIONS, 1961 (S.I. No. 625) (4d.);

(SCOTLAND) (AMENDMENT) REGULATIONS, 1961 (S.I. No. 615) (4d.); SPECIAL CONSTABLES (PENSIONS) (SCOTLAND) REGULATIONS, 1961 (S.I. No. 618) (4d.).

Probation

The Probation Rules, 1949 (S.I. No. 1328), are amended by re-enacting the existing rule relating to the provision of cars for use by probation officers in connection with their duties, so as to enable probation committees to give financial assistance to a probation officer to enable him to buy a car for that purpose. The Secretary of State is required to approve the terms on which such financial assistance is given. Operative April 1, 1961. PROBATION RULES, 1961 (S.I. No. 532) (2d.).

Road Traffic

The previous Regulations (S.I. 1957, No. 1961, in respect of England and Wales, and S.I. 1957, No. 2038 in respect of Scotland) are replaced and new procedure is prescribed to be followed in connection with the making by local authorities of orders under sections 26 and 27 of the Road Traffic Act, 1960. The main changes are (1) new provision is made that, where a public hearing has been held into any proposed order which would prohibit the loading or unloading of vehicles on a road during more than six hours in all in any period of twenty-four hours, a copy of the report of the hearing together with certain other documents, must be sent to the Minister of Transport or Secretary of State. Objectors must be informed that this has been done and no such order must be made by the local authority until one month after the documents have been sent as aforesaid; (2) certain orders under section 26 are excluded from the operation of Part III of the Regulations if they are orders made jointly under that section, and section 81 of the Road Traffic Act, 1960, to which Part III of the Parking Places Orders (Procedure) Regulations and (Scotland) Regulations, 1961 (S.I. Nos. 411 and 505) applies. TRAFFIC REGULATION ORDERS (PROCEDURE) (ENGLAND AND WALES) REGULATIONS, 1961 (S.I. No. 485) (6d.) (operative March 24, 1961) and (SCOTLAND) REGULATIONS, 1961 (S.I. No. 669) (6d.) (operative April 13, 1961).

See also under **Scotland,** below, p. 425.

Scotland

A scale of fees payable to clerks to Licensing Courts in Scotland for work done in connection with applications under the Betting and Gaming Act, 1960, has been prescribed. Operative March 24,

1961. ACT OF SEDERUNT (FEES OF CLERKS TO APPROPRIATE AUTHORITIES), 1961 (S.I. No. 692) (3d.).

Various provisions of the Mental Health (Scotland) Act, 1960, are brought into operation on May 15, 1961. These include (1) section 6 which defines the term "mental disorder"; (2) provisions in Part II of the Act, dealing with the functions of local health authorities, welfare authorities, and children authorities, and which make certain amendments to the Education (Scotland) Act, 1946; and (3) certain general provisions and provisions making consequential repeals, one of which (section 26 of the Lunacy (Scotland) Act, 1913) will have the effect of relieving local authorities of the duty to make payments in respect of the maintenance of mental defectives placed under the guardianship under that Act. MENTAL HEALTH (SCOTLAND) ACT, 1960 (APPOINTED DAY No. 2) ORDER, 1961 (S.I. No. 668) (3d.).

Regulations which came into operation March 27, 1961, prescribe the procedure to be followed in connection with the making by local authorities of orders under section 81 of the Road Traffic Act, 1960, or under or by virtue of section 11 of the Road Traffic and Roads Improvement Act, 1960, in relation to parking places which may be provided under the said section 81. Part V of these Regulations contains provisions about public inquiries held in connection with local authorities' orders. PARKING PLACES ORDERS (PROCEDURE) (SCOTLAND) REGULATIONS, 1961 (S.I. No. 505) (6d.).

See also under **Police,** above, p. 423.

See also under **Road Traffic,** above, p. 424.

Sea Fisheries

Previous Orders of 1948 (S.I. No. 1480) and 1954 (S.I. No. 687) are superseded by this Order which continues the prohibition of the landing, sale or possession for sale in Great Britain of certain species of sea-fish below certain specified sizes, but states the sizes in centimetres instead of inches. The size-limits are substantially unchanged except that the minimum size of haddock is reduced by nearly half an inch. Operative April 1, 1961. SEA-FISHING (IMMATURE SEA-FISH) ORDER, 1961 (S.I. No. 543) (3d.).

For penalties for contraventions, see section 4 of the Sea-Fishing Industry Act, 1933, as amended by section 38 of the Sea-Fishing Industry Act, 1938.

By the Sea-Fishing Industry (Fishing Nets) Order, 1956, as amended, British fishing boats might not carry in certain waters nets with a mesh less than prescribed sizes, and trawl nets were required to be of a larger mesh on and after April 5, 1961. These earlier

Orders are now re-enacted save that April 5, 1963, is substituted for April 5, 1961, and the period during which a cod-end chafer may legally be attached to the upperside of the cod-end of a net other than a seine net is extended until April 4, 1962. Nets carried for fishing for Norway Pout (Gadus esmarkii) are now included amongst nets exempted from the provisions of the Order. Operative April 1, 1961. SEA-FISHING INDUSTRY (FISHING NETS) ORDER, 1961 (S.I. No. 542) (3d.).

For penalties for contraventions see section 3 of the Sea-Fishing Industry Act, 1933, as amended by section 38 of the Sea Fishing Industry Act, 1938.

Practical Problems

All questions for consideration should be addressed to " The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of Readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

82. *Motor-car on tow—whether requiring a Road Fund Licence*

Does a motor-car which is, apart from the battery being flat, mechanically sound, require a Road Fund Licence when being towed by another motor-car?

One argument is that whilst being towed it is a trailer and therefore does not require a Road Fund Licence and the other is that such a vehicle would not come within the definition of " trailer " in view of the fact that apart from the battery it is mechanically sound, and therefore requires a Road Fund Licence. Your opinion would be very much appreciated. [J. G. F.]

ANSWER

If the vehicle is defective to the extent that it cannot be driven as a mechanically propelled vehicle then I think it is a mere trailer when being towed. It is however essential, in order to take the vehicle out of the definition of a mechanically propelled vehicle, that it is quite impossible to drive it or make it work. In *Lawrence* v. *Howlett* [1952] 2 All E.R. 74 a pedal cycle fitted with an auxiliary engine, the parts of which had been removed to the extent that the engine could not work was *not* a mechanically propelled vehicle. But in *Floyd* v. *Bush* [1953] 1 W.L.R. 242 a pedal cycle fitted with an engine which was not working, but which was capable of working, was nevertheless held to be a mechanically propelled vehicle. The distinction is a narrow one but povided the vehicle you refer to was at the time defective to the extent that it could not be driven, then in my view it falls within the definition of a trailer. [F. M. D.]

Letters to the Editor

Laymen and Lawyers

Sir,

Mr. Godfrey Phillips, for 13 years a Deputy Chairman of Quarter Sessions, in his recent letter to *The Times* draws attention to the great value of the association between laymen and lawyers on the Bench at County Quarter Sessions. It is his contention that if it is right for lay Justices to sit with Chairmen at County Sessions, they should also sit with Recorders at Borough Quarter Sessions—presumably Justices from a neighbouring petty sessional division—when hearing cases sent up either by way of committal or appeal.

Whilst as a member of a Borough Bench it would be improper for me to comment on this proposal, I would strongly suggest that there is a case for extending the jurisdiction of Borough Justices (where there is a separate Commission of the Peace) to permit them to adjudicate at County Sessions, where they have no statutory right to participate. This would not only assist County Justices, who, in some areas, are deficient in manpower and find it difficult to give sufficient time to often long, indeed almost continuous, sittings of quarter sessions, but it would give Borough Justices a wider experience for work in petty sessions.

The fact that Borough Justices as constituent members of Magistrates' Courts Committees—responsible administratively for all courts of summary jurisdiction—enjoy similar powers to their county brethren, would suggest that in status and ability they are well qualified to active participation at County Quarter Sessions instead of, as at present, remaining mere observers.

The purpose of this letter is strongly to suggest that on grounds both of consistency and expediency all lay Justices should be given the right to adjudicate at Quarter Sessions under a legally qualified Chairman.

Yours faithfully,

B. LEIGHTON, J.P.

Wonersh, Guildford.

The Police as Prosecuting Officers

Sir,

May I seek your indulgence not merely for myself, but as President of the London (Criminal Courts) Solicitors' Association, to correct a misleading impression given by Mr. Williams' letter to those who may not have seen my previous letter. Mr. Williams attributes to me the statement that the efforts of prosecuting Police Officers are worthless. If he will look at my previous letter he will observe that I wrote no such thing; nor do I believe it. Within the limits of their qualifications the prosecuting Police Officers obviously make a contribution to the interests of justice.

Mr. Williams has taken my use of those words out of context. What in fact I wrote was as follows: "The system in which unpaid Lay

Justices try cases presented by untrained Police Advocates is no doubt justified in the minds of some as affording what is so often called 'cheap justice.' One of the definitions, however, of 'cheap' in the Oxford Dictionary is 'worthless, of little account' and there are some who may feel that justice of that description is dear at any price."

It will be appreciated that in this context the word "worthless" was not directed as criticism against the activities of prosecuting Police Officers, but to the proposition, which now finds support in your editorial, that prosecutions should be conducted by Lawyers and that the authorities should face the financial responsibility incumbent upon them in avoiding the obtaining of justice "on the cheap."

Yours truly,
David Napley,
President of the London (Criminal Courts) Solicitors' Association.

Books and Periodicals

Book Reviews:

Encyclopedia of Road Traffic Law and Practice. By John Burke, Barrister-at-Law. One volume (looseleaf). London: Sweet & Maxwell, Ltd. £7 7s. net, including releases up to December, 1961 (to be kept up-to-date by periodic releases); First Release, February 12, 1961.

This is a new volume in the publishers' *Local Government Library,* although it will probably be used much more by private practitioners and magistrates' clerks than by lawyers in local government practice, as it does not profess to deal with the related subject of highway law. Within its self-appointed field, the work is, however, of very great practical value.

It does not attempt to give any narrative account of the Road Traffic Acts (although a consolidation Act of some 270 sections was passed as recently as 1960, this has already been amended by two major statutes); indeed such a task would probably be unprofitable and unreadable if not well-nigh impossible. The volume, contained in looseleaf covers in a style similar to the *Encyclopedia of Town and Country Planning*, starts with a print of the Act of 1960, heavily annotated, and this is followed by the other Acts relevant to the subject, then by the various voluminous sets of Regulations, and finally, by precedents of informations, summonses and indictments drafted by a prosecuting solicitor and a clerk to magistrates.

The work of preparing such a mass of material for practical use has been well done; the sections are fully amplified with references to case law and articles in periodicals, and so are the Regulations where relevant. The choice of Regulations has been sensible, although perhaps some of the more important sets relating to London might have been included —they have been, after all, considered worthy of treatment in the " precedents " section. Also the Local Government (Allowances for Attendance at Road Safety Conferences) Regulations, 1957 (see p. 3401) could have been omitted as not being concerned primarily with road traffic; the note on p. 1279 would have been sufficient.

The claim of the learned editor in his preface that " every relevant case has been caught and noted," seems to be justified; the book is certainly arranged in a logical and practical manner and should prove easy to use in court, where it deserves to stand beside such accepted favourites as *Stone* and *Patterson*. Users of the book must, however, be prepared from time to time to perform the menial task of inserting releases of material correctly—or at least to delegate this task to some responsible clerk. The looseleaf textbook is so obviously suited to this kind of ever-changing subject that no busy practitioner can afford to be old fashioned and permanently prejudiced against the device.

The first release of amendments brings the annotations to new cases, commencement orders, etc., up to date, and includes a few sections from the Road Traffic Act, 1930, hitherto omitted, and also the Public Service Vehicles (Travel Concessions) Act, 1955.

May we hope that the diagrams attached to various Regulations will, as promised, be issued in an "early release"; subject to this the book can truthfully be said to be *complete.*

J. F. G.

Police Charges. By Inspector J. Daniel Devlin, LL.B. London: Police Review Publishing Company. 1961. 223 pp. (including two indices). 12s. net.

It has long been the plaintive cry of this reviewer that there was a dearth of books for the Police in this country. This sad state of affairs was constantly emphasised by the excellence of Messrs. Blackwell's series of American imports.

Suddenly, the position appears to be improving and if this book and Mr. Christopher Williams' *Prosecuting Officer* are straws in the wind, Heaven be praised! It is even more satisfying to find that the need is being met by serving Police officers and exceedingly well they are doing it, too.

Mr. Devlin was responsible for that other excellent book, *Criminal Courts and Procedure*, and he has now produced this further work of reference for Police officers. Whereas the former was for the man studying for promotion, his latest is a work for daily use.

This is not the first time that this project has been attempted and one thinks of earlier editions by other authors; but no one has ever produced such a thorough affair as Inspector Devlin. In his usual painstaking manner, his researches have been most thorough.

For each offence he gives the power of arrest; the type of offence; where triable; the period of limitation; the maximum punishment; whether consent is necessary for the prosecution and whether the offence is contained in the Third Schedule to the Firearms Act, 1937.

It is a wonderful piece of work and it should prove invaluable to the busy station officer. One could only wish that Mr. Devlin had been better served by his publishers in the matter of the binding of the volume; for, if ever there was a book destined to be well-thumbed, this is it!

HUGH DUDLEY.

Readers' Digest:

Betting and Gaming: Tombola and the new gaming laws: 69 *Police Review* 276.

Coroners: Duties of a coroner: 105 *Solicitors' Journal* 374.

Evidence: Colour photography applied to police and legal procedure: 16 *International Criminal Police Review* 59.

Evidence: Judges' Rules: Confessions: 69 *Police Review* 302.

Homicide: Self-defence: 231 *Law Times* 246.

Law Enforcement: The case of the Manchester flower-sellers: 125 *Justice of the Peace* 257.

Law Reform: Attempted suicide (with an account of police practice in other countries): 125 *Justice of the Peace* 240.

Law Reform: Criminal Justice Bill amended on Report: 125 *Justice of the Peace* 275.

Magistrates' Courts: The onus of proof: 125 *Justice of the Peace* 255.

Malicious Prosecution: The action for malicious prosecution: 111 *Law Journal* 284.

Procedure: Committal to quarter sessions: change of plea: 231 *Law Times* 188.

Road Traffic: Road traffic cases in 1960 (1): 69 *Police Review* 258.

Road Traffic: The Road Traffic Bill: 105 *Solicitors' Journal* 333 and 373.

Sentence: An Australian experiment in probation and parole: 9 *Probation* 126.

Vehicle Taxation: "Constructed or adapted"—a motor taxation problem (based on *Taylor* v. *Mead*, above, p. 411): 125 *Justice of the Peace* 201.

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1961

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.*4. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

July 1961

Something is rotten . . .

Criminological and penal problems are currently making the most remarkable stir. The Home Secretary and the Prime Minister express their alarm at the incidence of crime. Representatives of government and governed almost daily advance proposals for changes (to use a neutral word) in the treatment of offenders. Experience of the working of the Homicide Act contributes largely to the emergence of the National Campaign for the Abolition of Capital Punishment on the one hand and the Anti-Violence League on the other. The issue of corporal punishment refuses to lie down and die.

Pundits and Press debate the relevance of mass feelings on these subjects. To one school they are the expression of a malaise which must, for the sake of the long-term good of society, be alleviated by drastic means; to another school they are the understandable product of unschooled emotion and unreflecting prejudice which, while significant for political reasons, cannot be permitted to override the results of trained and dispassionate fact-finding and analysis.

Meanwhile the courts' lists are overcrowded; so are the prisons, the staffing problems in which have been both exposed and aggravated by recent disturbances. The criminal lawyers almost alone benefit, riding the crest of a crime wave on the raft of legal aid and awaiting the results of the institutional contamination which can be predicted from the imprisonment of each successive client.

Amid all the talk of "deterrents" and "recidivism," "treatment" and "reform," we beg leave to doubt whether our energies are directed in the right direction in our attempt to control the statistics of crime—the statistics, that is to say, for 1970, 1980. "Reform," we may ask, of what? Of convicted offenders? Of the penal system? It is time we said, to the disquiet and disturbance of us all: reform, not of these, but of our very attitudes and values as a society. Crime is a social phenomenon, and its causes cannot be isolated from the nature of the society in which it flourishes. What do we believe in? What sort of people do we wish to be? What is our order of priorities? These are the questions that must be asked. They must be asked not so much by criminologists as a class as by all of us, and they must painfully exercise the minds of those people particularly concerned with such things as education, the press, broadcasting and television, advertising, hire-purchase . . . the list is endless—the rethinking required is radical. It is the treatment of society which is the key to the treatment of delinquency.

The right attitude

A recent news item [1] has revealed a police inspector as acting, so we respectfully think, in the best traditions of prosecution advocacy. The incident has interest as a postscript to correspondence lately conducted in this *Review* on the desirability of police officers doing lawyers' work in the courts.

A man was charged with an offence of obstructing the free passage of the highway by opening the door of his van in the path of a cyclist. The tragic result of the offence was the death of the cyclist who was thrown under the wheels of another vehicle. But the serious consequences were irrelevant to the offence and the penalty; traffic conditions at the time were relevant, but not the fact that the cyclist died.

The inspector who prosecuted did not put before the court the consequences of the accident, on the ground that they would have been prejudicial to the defendant. The decision to limit the evidence in this way was well within the inspector's discretion in the conduct of his case and shows, we feel, admirable discrimination and, in the sense relevant to these matters, a proper sense of duty.

The Streatfeild Report

The Home Secretary stated in a written answer that the Government are in general agreement with the recommendations of the Streatfeild Committee on the Business of the Criminal Courts.[2] Legislation would be required on certain matters, and he was not yet in a position to say when this could be introduced. The Lord Chancellor and himself were proposing to consult those concerned with a view to implementing as soon as possible certain of the recommendations which do not require legislation.[3]

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[1] *The Times*, June 5, 1961. See further *The Times*, June 16, 1961.

[2] See above, p. 209.

[3] H.C. Deb., Vol. 640, col. *162*.

Howard League for Penal Reform—Summer School

This year the Summer School will be entirely devoted to different approaches to one subject: the treatment of the young offender. The venue is Churchill Hall, Bristol, one of the halls of residence of the University; and the course will last from the evening of September 4 (Monday) to the morning of September 9 (Saturday).

The School is open to all those interested in this field, and members will have every opportunity to question the speakers and to participate in group discussions after the morning lectures. Visits to various institutions in the area have been arranged, including approved schools and Leyhill Open Prison.

The charge will be £9 per person for the full period, or £2 per day for a shorter period. In addition, there is a registration fee of 10s. to cover the expenses of organisation. Cost of transport for visits is not included, but this will in no case amount to more than a few shillings. Non-residents attending the lectures will be charged 2s. 6d. per lecture, or £1 for the whole series.

Further details and *application forms* are obtainable from:
The Acting Secretary,
The Howard League for Penal Reform,
Parliament Mansions,
Abbey Orchard Street,
London, S.W.1.

It is advisable to book as soon as possible, to ensure a place.

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Success and Failure in Criminal Attempts

By J. C. SMITH, M.A., LL.B.,

Professor of Law in the University of Nottingham

In *Rogers* v. *Arnott*[1] the accused, Arnott, was charged with attempting to steal a tape recorder, contrary to section 1 (1) of the Larceny Act, 1916. He was a bailee of the machine which was the subject of a hire-purchase agreement made between two other persons. The prosecutor, a police officer, as a result of information received, made an appointment to meet him. The accused produced the tape recorder, demonstrated it and offered to sell it to the prosecutor who thereupon disclosed his identity and arrested him.

The defence, which was accepted in the magistrates' court in which the prosecution was brought, was the somewhat bold one that the offence committed amounted to the complete crime of larceny and *therefore* could not be an attempt to commit it. An appeal by way of case stated was dismissed by the Divisional Court (Lord Parker C.J., Donovan and Davies JJ.) in a judgment delivered by Donovan J. In both courts the argument on both sides seems to have been directed almost entirely to the question whether Arnott's action was the complete crime of larceny or not. It seems to have been assumed that, if the answer to this question was in the affirmative, it followed that a conviction for an attempt was impossible. That this conclusion necessarily followed is not self-evident and deserves closer attention than it appears to have received. Four questions might profitably be further examined:

1. Is failure an essential constituent of an attempt?
2. Did the attempt, if there ever was one, merge in the complete crime?
3. Was there ever an attempt?
4. Could Arnott be retried for larceny?

Finally, some consideration will be given to the questions of the nature of the offence of larceny by a bailee to which the case gives rise.

Attempts and failure

One view—which seems to have been more strongly advanced in America than in this country—is that failure is essential to the very nature of an attempt: that success categorically rules out attempt, being incompatible with it. "A failure to consummate the crime is as much an essential element of an attempt as the intent and performance of an overt act towards its commission." [2] ". . . attempt implies failure. . . ." [3] It is thought, however, that there is no logical impossibility in holding a man to have attempted what he has succeeded in. It may be going too far to say that "as an abstract proposition, every completed crime necessarily involves an attempt to commit it," [4] but it is quite clear that this is true of the great majority of crimes. If D writes a letter to P in which he deliberately makes false statements with intent to induce P to pay money to him, there is no doubt that an attempt to obtain by false pretences is committed as soon as D posts the letter.[5] The attempt may fail for many reasons, or it may succeed; and there is no obvious reason why, if it succeeds, it should suddenly cease to be the attempt which, until that moment, it was. The notion that an attempt must fail is probably due (as an American writer, Professor Rollin M. Perkins, has shown [6]) to a misunderstanding of the common law doctrine of merger, which is considered below. There is force in the following argument advanced by Perkins:

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[1] [1960] 2 Q.B. 244; [1960] 3 W.L.R. 73; [1960] 2 All E.R. 417.

> "Suppose . . . the uncontradicted evidence shows beyond doubt that the defendant attempted to commit the offence charged, but there is conflict in the testimony as to whether the attempt succeeded or failed. Some of the statements on the subject, if carried to their logical conclusion, would entitle the defendant to an instruction which would tell the jury in substance: (1) they must acquit the defendant of the completed offence unless satisfied beyond a reasonable doubt that the attempt was successful; (2) they must acquit the defendant of an attempt to commit the offence unless satisfied beyond a reasonable doubt that the attempt failed. In other words the position would be that the defendant is entitled to a verdict of not guilty if there is doubt in regard to success or failure although no doubt that the attempt was made. There is no proper basis for such a position, and probably no court would carry the unsound notion to such an absurd extreme." [7]

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[2] *Com.* v. *Crow*, 303 Pa. 91 at 98, quoted in Michael and Wechsler, *Criminal Law and Its Administration*, 620–621. See also at 626.

[3] Jerome Hall, *General Principles of Criminal Law* (2nd ed.), 577.

[4] *People* v. *Vanderbilt*, 119 Cal. 461, 463, quoted by Perkins, *Criminal Law*, 477. Perkins points out that this overlooks such crimes as involuntary manslaughter. And see below, p. 442.

[5] *Cf. R.* v. *Hensler* (1870) 11 Cox 570.

[6] *Criminal Law*, 477–481.

[7] Yet this result seems to be implicit in the doctrine of merger (below, p. 438). *Cf. R.* v. *Nicholls* (1847) 2 Cox 182, where, on a charge of assault with intent to commit rape (a misdemeanour) on a child, the prosecutrix gave evidence that there had been some penetration, and Rolfe B. directed the jury: ". . . if you are satisfied, from all the circumstances, that the child was mistaken as to the penetration . . . you are bound to

If, then, *Rogers* v. *Arnott* was decided on the assumption that a successful attempt is inconceivable and a legal impossibility, it is submitted that it proceeded on a false premise and, if there were no other possible *ratio decidendi*, that it should be regarded as wrongly decided; but there are two other possible bases for the decision which remain to be considered.

Did the attempt merge?

A narrower ground for the decision would be that the attempt merged in the completed crime. Kenny [8] propounded a general rule that all attempts merge in the complete offence; but this has been repudiated by his latest editor, Mr. J. W. C. Turner, who has demonstrated that the common law doctrine of merger applied only to a charge of misdemeanour where the facts proved showed that a felony had been committed.[9] An attempt is, of course, a common law misdemeanour and an attempt to commit a felony would therefore merge in the complete offence, but an attempt to commit a misdemeanour would not so merge.

Dr. Glanville Williams [10] has urged that the doctrine of merger is abolished by section 12 of the Criminal Procedure Act, 1851.[11] This provides:

> "If upon the trial of any person for any misdemeanour it shall appear that the facts given in evidence amount in law to a felony, such a person shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanour."

Halsbury's *Laws of England* [12] also attributes this effect to the Act while *Archbold* [13] states that the section would prevent a charge of attempted buggery from merging but, curiously, does not consider the effect of the section on other attempts or on attempts generally. Mr. Turner does not accept this view, arguing in *Russell* [14] that the Act is intended to make procedural changes

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find the prisoner guilty." If the charge had been rape, it would have been necessary to direct the jury that they could convict only if satisfied that the child was *not* mistaken.

[8] *Outlines of Criminal Law* (15th ed.), 94.

[9] 16th ed., 83; 17th ed., 94.

[10] *The Criminal Law*, 503.

[11] 14 & 15 Vict. c. 100.

[12] Simonds edition, Vol. 10, 307.

[13] 34th ed., § 2978.

[14] 11th ed., 208–209. Mr. Turner seemed inclined to accept that the Act did abolish merger in the 16th ed. (1952) of *Kenny* (p. 84) but has evidently reconsidered the matter in the meantime.

only and not to affect the substantive law. This view is difficult to follow, especially as no situation is suggested to which the section could apply if it does not apply to cases of merger. What does the section do if it does not abolish merger? The only instance of its application given in *Russell* is on p. 805:

> "On an indictment under section 6 (1)[15] [of the Sexual Offences Act, 1956], even if the facts proved constituted rape, it would seem that the accused might be convicted of the misdemeanour under section 5[16] [*sic*] by virtue of the Criminal Procedure Act, 1851, . . . s. 12."

This seems to be precisely the kind of situation in which, before 1851, the doctrine of merger would have applied[17] and is difficult to reconcile with the view that that doctrine is still the law.

However, the matter appears to have been put beyond doubt for, as Mr. Colin Howard has pointed out,[18] the Court of Criminal Appeal held in *R.* v. *Garland*[19] that the doctrine of merger is abolished by the section. The prosecution in that case intended to charge D with the felonious receiving of stolen goods under section 91 of the Larceny Act, 1861, but owing to a defective indictment, the charge actually made amounted only to the common law misdemeanour of receiving. The facts proved in evidence at the trial amounted to the felony and, at common law, D would clearly have had to be acquitted; but the court held that the case came within the scope of section 12 and that D could be convicted of the misdemeanour. Subsequent cases are to be found in which there is no reference to the doctrine of merger but which are explicable only on the assumption that that doctrine is no longer law. Thus in *R.* v. *Aberg*[20] convictions (i) of aiding and abetting one K in the felony of being at large while a sentence of penal servitude passed on him was still in force; (ii) of being an accessory after the fact to the same felony; and (iii) of misprision of the same felony (a misdemeanour) were allowed to stand together, although all were based on the same facts. In *R.* v. *Loughlin* [21] Paull J. allowed a jury to convict of both attempted murder (a felony) and of assault occasioning actual bodily harm (a misdemeanour), apparently on the same facts. This can leave no doubt that, in a trial on indictment, the doctrine of merger is abolished and, that being so, no indictment for an attempt ought to fail on the ground that the crime attempted was a felony and has been completed.

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[15] Sexual intercourse with a girl under sixteen and over thirteen.

[16] Sexual intercourse with a girl under thirteen. This, of course, is a felony. For "section 5" one should presumably read "section 6 (1)." The confusion, no doubt, arises from the fact that s. 6 (1) of the 1956 Act replaced s. 5 of the Criminal Law Amendment Act, 1885. The number of the new section has been substituted in the first line of the passage quoted but not in the last line. *Cf.* 10th ed., 820–821.

[17] *Cf. R.* v. *Nicholls*, above, p. 437.

[18] "The Successful Attempt" (a note on *Rogers* v. *Arnott*) (1961) 24 M.L.R. 166.

[19] [1910] 1 K.B. 154.

[20] [1948] 2 K.B. 173. And see *R.* v. *Williams* [1953] 1 Q.B. 660 and *R.* v. *Davenport* [1954] 1 W.L.R. 569; [1954] Crim.L.R. 383, in which the Court of Criminal Appeal, while upholding convictions for larceny and embezzlement respectively, said that the accused ought to have been charged with fraudulent conversion.

This, however, is not necessarily the end of the matter. Arnott was not tried on indictment but summarily before a magistrate. The opening words of section 12 which abolish the doctrine of merger are in themselves wide enough to abolish it for all purposes: "If upon the trial of any person for any misdemeanour it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour. . . ." This clearly covers the case of *Rogers* v. *Arnott*: but these words cannot, of course, be considered in isolation but only in the context of the statute in which they appear. An examination of the statute as a whole seems to show that it is concerned with the reform of the procedure in jury trials and not with summary procedure. The second part of section 12 itself, by its reference to the discharge of the jury and the power of the court to direct the accused to be indicted for felony, seems to assume that the trial referred to in the first part is a jury trial.

Against this, it may be said that there is a significant difference between the wording of section 12 and that of section 11 (and other sections). Section 11 begins:

> "If upon the trial of any person *upon any indictment* for robbery. . . ."

The absence of the italicised words from section 12 (above) might be said to give that section wider scope. Moreover, section 9 reads:

> ". . . if on the trial of any person charged with any felony or misdemeanour, it shall appear *to the jury* upon the evidence. . . ."

Again the italicised words do not appear in section 12. To some extent, however, this negatives the argument based on the comparison with section 11; for section 9 does not contain any specific reference to indictment, yet it clearly contemplates jury trial. The conclusion would seem to be that the Act is somewhat loosely drawn and that it would be dangerous to attribute to any one section a much wider effect than that which the Act as a whole is obviously intended to have, merely on the ground of a slight difference in wording. Finally, it may be noted that in the interpretation section, it is stated: " . . . the word 'indictment' shall be understood to include 'information,' 'inquisition,' and 'presentment,' . . ." It seems clear from the context that "information" here refers not to the information which is preferred in a magistrates' court but to the more formal informations preferred by officials of the Crown as a substitute for indictments—and which, with the exception of *ex officio* informations by the Attorney-General, were abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 12. This conclusion is warranted by the *noscitur a sociis* rule, each of the other items being a form of proceeding which would result in a jury trial.

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[21] [1959] Crim.L.R. 518; [1959] Crim.C. & C. 6.

In *Pender and Others* v. *Smith* [22] it was held by the Divisional Court that section 9 of the 1851 Act does not apply to summary proceedings. The accused was charged with an offence under the Licensing Act, 1953. It appeared that the police had struck too soon and made an arrest before the offence was complete. The court thought it was clear that an attempt had been committed, but, "There being no jurisdiction in the magistrate to convict of an alternative offence, namely of an attempt, even if that were possible, the matter cannot arise here." The point was not argued but it is submitted that there can be little doubt that this is the correct conclusion on section 9. Only the flimsiest of grounds can be advanced for arriving at a different conclusion as to section 12 and it is submitted that the better view is that that section similarly has no application to summary proceedings.[23]

If, then, the case was decided on the assumption that the attempt had merged in the felony, it would seem that it was rightly decided but that its effect is confined to proceedings in magistrates' courts and appeals therefrom. The doctrine of merger would not have saved Arnott from conviction for an attempt if he had exercised his right to go for trial on indictment. It cannot be pretended that this is a satisfactory result, but it is at least less far-reaching than a general holding, that a successful attempt is an impossibility. It points the need for an extension to the magistrates' courts of those statutes which allow convictions of an alternative offence on indictment. Apart from the provisions of the Criminal Procedure Act, 1851, attention should be directed to section 44 of the Larceny Act, 1916, which allows the conviction of a prisoner of embezzlement or false pretences on an indictment charging larceny and vice versa and which, similarly, has no application to summary proceedings.[24]

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[22] [1959] 2 Q.B. 84; [1959] Crim.L.R. 520.

[23] Mr. Howard, *op. cit.*, takes a different view, arguing that the Act applies, "so far as appropriate, to summary trial as well as to trial by jury." He is of the opinion that section 9 applies to summary trial; but he does not refer to *Pender* v. *Smith*.

Was there ever an attempt?

When a reason has been propounded—the continued application of the doctrine of merger to summary proceedings—which accounts satisfactorily for the assumption on which the case was decided—that if the crime was completed, there could be no conviction for an attempt—it may be thought superfluous to pursue this inquiry further. The actual *ratio decidendi*, however, is rather difficult to discover. Since the assumption was treated (in the report at least) as self-evident, the question of merger is not referred to and there is naturally no mention of the Criminal Procedure Act, 1851. Is it possible that there is some basis for the decision other than the doctrine of merger?

That doctrine applied where the same act was both a misdemeanour and felony because of the presence of all the constituents of the misdemeanour and of those additional circumstances of aggravation required for the felony; as where D had sexual intercourse with a girl under the age of sixteen (a misdemeanour under section 16 of the Sexual Offences Act, 1956) and the girl did not consent (the felony of rape). In the case of attempts, however, the misdemeanour and the felony necessarily occur consecutively and not simultaneously. For the doctrine to apply there must, at some stage in the commission of the crime, have been a moment at which it was possible to say that there was an attempt to commit the crime in question, but no completed crime as yet. If the accused's actions had stopped at that moment, there would have been no difficulty of convicting him of the attempt. The problem arises because his actions continued and the substantive crime was consummated. Was there ever such a moment in *Rogers* v. *Arnott*? It is arguable that there was not or, at any rate, that the case proceeded on the footing that there was not, and that this, rather than the doctrine of merger, was the reason for the assumption on which the case was decided.

Basil Wigoder, for the defendant, is reported to have said[25]:

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[24] Mr. Howard argues (*op. cit.*) that if merger still applies in summary trial, one would expect the prisoner to be informed of this particular disadvantage of trial on indictment before being called on to exercise his option to go before a jury. This argument loses some of its force when the parallel instances under the Larceny Act, which appear to be definitely confined to jury trial, are recalled.

[25] [1960] 2 Q.B. at 246–247.

> "One has not heard of attempted fraudulent conversion because, if one attempts a fraudulent conversion, one commits the full offence. . . . Once the defendant decided to keep the appointment to sell the tape recorder, and certainly once he had put it into the car, he committed an act of conversion."

If all that was required for the complete crime of larceny by a bailee was, as counsel suggested, a decision in the mind of the defendant to sell the tape recorder, this was truly a crime where there was no intermediate stage between no offence and the full offence; where there could be no conviction for an attempt, not because of merger (there was nothing to merge) but for the more fundamental reason that no attempt ever existed. But what if, as is much more likely, the crime requires some act directed towards putting the intention into execution—such as putting the tape recorder into the car? Suppose that Arnott had been interrupted by the police as he went to pick it up, would not that have been attempted fraudulent conversion? Assuming that there was independent evidence of his *mens rea* it is arguable that even this would have been a sufficient *actus reus* for the complete crime. The court cited with approval passages discussing the meaning of "conversion" in section 1 (1) of the Larceny Act in *Kenny's Outlines of Criminal Law* and *Russell on Crime*. The former says that a conversion is "any conduct on [D's] part which shows that he assumes either the full title of ownership in the goods, or asserts a right to pass the full title of ownership."[26] The latter says that "any setting up by the offender of a full title to the property in himself, adverse to that of the owner"[27] is enough.

Is it possible for a man to attempt to "set up ownership" in himself without actually doing so? Is not *any* act done with intention of assuming the full title, in itself, an assumption of ownership? At any rate this, rather than the doctrine of merger seems to have been the basis of counsel's argument. It is true that he went on to say[28]:

> "However, the defendant is content if the case is dealt with on the basis that an offer for sale without authority is fraudulent conversion."

Now it is clear that there was some stage at which he was attempting to offer to sell the tape recorder and, if there was no conversion until the offer was made, the attempted offer would look like an attempted conversion; but, by this stage in the argument, perhaps the point was made and, so far as appears, not disputed by counsel for the prosecution, that there can be no attempted fraudulent conversion. At the very least it may be said that, while there is no suggestion anywhere in the report that the case was decided on the ground of merger, there is at least a suggestion that the basis of the decision was that there had never been an attempt; and it would seem clearly open to a future court —even one of inferior or co-ordinate jurisdiction—to hold that this is all that the case decided.

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[26] 17th ed. (by J. W. C. Turner), 255.

[27] 11th ed. (by J. W. C. Turner), 1095.

[28] p. 247.

Is it desirable that this line should be taken? The effect of so holding would be to extend the effect of the case from summary proceedings to trials on indictment. It may be thought that this would be unfortunate, for the defence in *Rogers* v. *Arnott* was completely unmeritorious and it is desirable that unmeritorious defences should be confined within the narrowest possible limits. On the other hand, it would leave open the question of the continued application of the doctrine of merger to summary proceedings. If a future court should see its way clear to reject the view stated above as to the limited application of the Criminal Procedure Act, the effect of the "no attempt" interpretation would be that that rule would apply to a much narrower range of situations than if the "merger" interpretation were adopted: for there cannot be many crimes which it is impossible to attempt.

Stephen, it is true, writes [29] that "there are a large number of crimes which it is impossible to attempt to commit" and he instances compassing the King's death, perjury, riot, libel, the offering of bad money and assault. The first example may be accepted; for, though an overt act as well as a mental operation is required to amount to compassing, it would seem that any act directed towards accomplishing the end contemplated would suffice. But it is not at all clear that attempts are inconceivable in the other cases. D is restrained from putting his signature to an affidavit which he knows to be false. This is surely attempted perjury. Three or more persons assemble with intent to carry out a common unlawful purpose by force and so as to alarm other persons but are prevented at the last moment from beginning the execution of that purpose. There is no riot until they do so begin; but why is there not an attempt? D writes a letter defamatory of P to Q who never receives it or who burns it unread. This looks like an attempted libel. Similarly, a little ingenuity could devise an attempted offer of bad money. Stephen's examples, then, are hardly convincing and it may well be doubted whether his statement, that there is a "large number" of offences which it is impossible to attempt, is accurate.

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[29] *History of the Criminal Law*. Vol. II, 227.

In one case the Court of Criminal Appeal did use language suggesting that an attempt to demand money with menaces is an impossibility. In *R.* v. *Moran*[30] the appellant had been convicted of attempted robbery on an indictment charging him with attempted demanding under section 30 of the Larceny Act, 1916. The court quashed the conviction on the ground that this verdict was not open to the jury on the indictment and that it was not a proper case for the court to exercise its power under section 5 (2) of the Criminal Appeal Act, 1907, to substitute a verdict of guilty of demanding with menaces. The court is reported to have said:

> "There cannot be a verdict of attempting to demand money with menaces. A man may form the intention of demanding money with menaces and then not put his intention into practice. In that case he would not be guilty of demanding. But the court cannot see how a person can be guilty of an attempt to demand; there is a demand or there is not."[31]

It may be accepted that, on the evidence before the jury in that particular case, either there was a demand (if the evidence was believed) or there was not (because the evidence was disbelieved); but if this was intended to be a proposition of general application,[32] it has, with respect, been rightly criticised[33]; and writers have posed a number of cases in which there is clearly an attempt to demand. "If D posts a letter to P demanding money with menaces, and the letter never reaches P, there is surely an attempt to demand."[34]

Apart from compassing, the only cases where an attempt is clearly an impossibility are those which may be committed purely by omission, of which misprision of felony is the obvious example, and those where the crime, by definition, may be committed recklessly or negligently but not intentionally. The only crime in the latter category which comes to mind is involuntary manslaughter. It is of the essence of this crime that the killing be done unintentionally, for an intentional killing (in the absence of diminished responsibility, provocation or a suicide pact) is necessarily murder. Yet it is of the essence of an attempt that the consequence required by the definition of the crime (*i.e.*, in the case of both murder and manslaughter, a killing) should have been intended.[35] If there is an intention to produce this consequence the crime is necessarily attempted murder, if there is no intention to produce it, there cannot be an attempt at all.

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[30] (1952) 36 Cr.App.R. 10; 116 J.P. 216; [1952] 1 All E.R. 803.

[31] 36 Cr.App.R. at 12.

[32] The language in the short *All England* report in fact confines the proposition to the facts of the case before the court.

[33] J. Ll. J. Edwards, 15 M.L.R. 346; *Russell*, 995; Williams, *The Criminal Law*, 472, n. 7.

[34] Williams, *op. cit.*, n. 33, above.

[35] See 70 Harv.L.R. 422.

An attempt to commit voluntary manslaughter, on the other hand, is a possibility. This variety of manslaughter may be committed when death is intended: *Attorney-General of Ceylon* v. *Perera*.[36] If D, having received such provocation as would reduce murder to manslaughter, shoots at P with intent to kill him and misses, this would appear to be attempted manslaughter, assuming that the defence of provocation applies to a charge of attempted murder. It is reasonable to suppose that provocation, being a defence at common law, will be applied to such a charge. It is not so clear that diminished responsibility and suicide pact, being statutory defences[37] available on a charge of murder, could properly be extended to charges of an attempt, though there is slight persuasive authority in favour of such an extension.[38]

It would appear, then, that the "no-attempt" interpretation of *Rogers* v. *Arnott* would give the rule in the case a very narrow scope, while leaving the question of the application of the Criminal Procedure Act open.

The question of a retrial

Some consideration should be given to the question, which was raised but not answered in the case, whether Arnott, having been acquitted of the attempt, could be retried for the full offence. If the Criminal Procedure Act applies to summary trial, the possibility seems clearly to be ruled out by the express words of the statute: "No person tried for such misdemeanour shall be liable to be afterwards prosecuted for the same felony on the same facts. . . ."

If the Act does not apply the position is not so clear. On a charge of larceny, Arnott could not say either that he had been acquitted of *that* offence before or that he had ever been in peril of conviction of it. While, according to the Interpretation Act, 1889,[39] a man "shall not be liable to be punished twice for the same *offence*," "It is not the law that a person shall not be liable to be punished twice for the same *act*. No court has ever said so and the Interpretation Act does not say so."[40]

On the other hand, if Arnott were committed for trial for larceny the effect of section 9 of the Criminal Procedure Act would be that he would apparently be in peril of being convicted of the attempt of which he had been acquitted. In *R.* v. *Thomas*[41] it was held that one who has been convicted of wounding with intent to murder may be indicted for murder if the victim subsequently dies within a year and a day of the wounding. But, apart from the point that the death is a new factor which has occurred after the conclusion of the first trial, there is the difference that there can be no conviction of wounding with intent on an indictment for murder, so that there was no possibility of the accused being put twice in peril for the same technical offence. The court in *R.* v. *Thomas* seems to have attached some importance to this latter point, but it would appear to be by no means conclusive in the accused's favour. In *R.* v. *Tonks*[42] the accused was convicted of an offence of neglect under section 12 of the Children Act, 1908, as a result of which the child subsequently died. An indictment for manslaughter was then preferred. Under section 12 (4) of the Children Act there was a provision that a person charged with manslaughter of a child by neglect might be convicted of one of the offences under the section on that same indictment if the jury found that the death did not occur as a result of the neglect. It appeared then that the accused was in peril of being convicted again of the offence under section 12 of which he had already been convicted. The court got over this difficulty by holding that " effect can be given to section 12 (4) by the judge telling the jury that they must, having regard to the special facts of the case, either come to the conclusion that the accused is guilty of manslaughter or return a verdict of acquittal. The judge could not, as he could in a normal case under the section where there had been no previous conviction for wilful neglect of the child, point out to the jury that it is open to them if they think fit to find the prisoner guilty only of the lesser offence on the indictment for the greater one." Applied to *Rogers* v. *Arnott*, the effect would be that the judge would tell the jury that they could convict of larceny or acquit altogether.

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[36] [1953] A.C. 200, 205–206.

[37] Homicide Act, 1957, ss. 2 and 4, respectively.

[38] *R.* v. *Collier* [1960] Crim.L.R. 204; [1960] Crim.C. & C. 147.

[39] s. 33.

[40] *R.* v. *Thomas* [1950] 1 K.B. 26 at 31, *per* Humphreys J.

There remains the fact that in *R.* v. *Tonks* and *R.* v. *Thomas* the new fact of death had occurred after the first trial, but this would seem not to affect the result, the test being simply whether the same offence is being put twice in issue. So in *R.* v. *Connell*[43] it was held that on an indictment for administering poison with intent to murder, a previous acquittal on an indictment for murder could not be pleaded in bar. Here no new event occurred between the two trials. It would appear likely then, that Arnott could be retried for larceny on indictment, and, *a fortiori*, summarily, if the Criminal Procedure Act has no application to summary proceedings.

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[41] Note 40, above.

[42] [1916] 1 K.B. 443.

[43] (1853) 6 Cox 178.

The constituents of larceny by a bailee

The acceptance by the court of the suggestions made by Mr. Turner as to the meaning of conversion in *Russell* and *Kenny* has already been referred to. The propositions advanced include no requirement of any "taking and carrying away," or asportation, and attention is now directed to the question whether this essential ingredient of a common law larceny is a necessary element of the statutory extension of the crime to bailees.

A good starting point is the case of *Bloxham*[44] which contrasts rather remarkably with the present case. Bloxham not only offered but actually contracted to sell and received the price for a refrigerator belonging to the Urban District Council which employed him; and yet was held to be not guilty of larceny on the ground that he had never done any act which was sufficiently proximate to the complete crime. He had gone further than Arnott; yet Arnott was held to have gone too far and Bloxham not far enough! The explanation is that Arnott was a bailee, Bloxham was not. It is stated in Cross & Jones, *Introduction to Criminal Law*,[45] that Bloxham was in possession of the refrigerator but there is nothing in the report to indicate that this is so. As an employee of the Council he would, at most, have had custody of it, but it seems very likely that he did not even enjoy that degree of control over it which is necessary to constitute this more limited concept. Most likely the only crime Bloxham could have attempted was a straightforward, common-law-type larceny under section 1 of the Larceny Act, 1916, and it was his omission to make any move to take and carry away the refrigerator which required his acquittal.

> "The very essence of the offence of larceny is the asportation, and if the appellant had done anything which could amount to an attempt to take and carry away the refrigerator, he would of course have been guilty of the offence with which he was charged. But the fact is that he took no step whatever connected either immediately or remotely with taking and carrying away this refrigerator."[46]

When the charge is one of larceny by a bailee, on the other hand, there is presumably no necessity for any taking and carrying away; for "taking" is essentially concerned with the infringement of another's possession or custody of a thing and can have no application when the thief is in possession, and "carrying away" would seem to be ancillary to taking. It is true that some reference was made[47] to "asportation" in *Rogers* v. *Arnott* and, of course, the tape-recorder must have been moved by Arnott while he had an *animus furandi*; but it would not seem to have been any part of the *ratio decidendi* that he "asported" it. Donovan J. said[48]:

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[44] (1943) 29 Cr.App.R. 37.

[45] 4th ed., 108.

[46] *Per* Tucker J., at 39.

> "If I am lent property, and then determine in my own mind to sell it for my own benefit contrary to the terms of the bailment, I have determined that in relation to the property I will no longer be a borrower but an owner, and an owner who wishes to sell. When I proceed to carry that intention into effect by offering the property for sale, I am standing in the owner's shoes in relation to that property and exercising an owner's right. In these circumstances I have, in my view, already converted the property to my own use. . . ."

This view is supported by *R.* v. *Wakeman*,[49] where a bailee of a bicycle, who refused to return it to its owner, was held guilty of larceny on the ground that "There was a sufficiently positive act of detention. . . ." Once again there had been some movement of the thing for Wakeman had been seen riding the bicycle at a time when he evidently had the *animus furandi*, so the case is not conclusive on the point.

Some help may be derived from the cases on the analogous crime of larceny by a servant. In both larceny by a bailee and larceny by a servant it is necessary to prove some act of conversion by a person who already has lawful physical control over the thing converted. The only apparent difference between the two cases is the somewhat technical one that the bailee has possession whereas the servant, in law, only has custody of the thing alleged to be stolen. It would seem reasonable to suppose that an act which would amount to larceny by one of them would also amount to larceny by the other. In the cases of larceny by a servant it seems always to have been assumed that an asportation is necessary. In *R.* v. *Poynton*[50] a letter-carrier omitted to deliver a letter containing money and put it in his trouser pocket with intent to steal it. On being questioned about the letter he produced it and told a false story. It was held that he was guilty of larceny on the ground that the *removal* of the property from its proper place with intent to steal amounted to the crime. But in *R.* v. *Cheeseman*[51] a servant was guilty only of an attempt where, by the use of a false weight, he retained in his custody a large quantity of meat which his master had contracted to sell, with intent to steal it. "If he had kept back a part and had begun to carry it away, he would have been guilty of the crime of larceny. . . . Everything was complete in this case but the beginning to move off with the meat." There are two significant differences between this case and that of *Bloxham*. Cheeseman had custody of the meat, Bloxham (apparently) did not have custody of the refrigerator; and Cheeseman's "attempt would have ended in the completion of the crime, had not the prisoner been interrupted"[52] whereas Bloxham, "having once obtained that money, and having shown by that act that he was not an honest man, there was no reason why he should implement the bargain he had made with Mrs. L. by stealing the refrigerator and delivering it to her."[53]

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[47] By Donovan J. [1960] 2 Q.B. at 251.

[48] p. 251.

[49] (1912) 8 Cr.App.R. 18.

[50] (1862) 9 Cox 249.

[51] (1862) 9 Cox 100.

Two lines of approach seem to be open regarding the analogy between larceny by a servant and larceny by a bailee:

(i) It might be held that in larceny by a servant some act amounting to a conversion of the goods is necessary, and that an asportation, though it may be sufficient, is not the only kind of act which will do. Thus an offer to sell goods which are never moved might be enough. *Cheeseman* is not an authority against this view for there was no act capable of amounting to a conversion in that case.

(ii) Even if an asportation is necessary in the case of larceny by a servant, it does not follow that this should necessarily apply to larceny by a bailee; for the former is a common law offence and may be expected to conform to the requirements of simple larceny at common law; whereas the latter is the creation of statute and depends on the interpretation of the words creating it.

It is perhaps significant that section 17 (1) of the Larceny Act, 1916, which codifies the common law of larceny by a servant, uses the verb "steals" and not "converts." "Steals" is obviously a more apt word to import the common law requirements of larceny than "converts." Moreover, a suggestion that the requirements of the common law offence are stricter than those of larceny by a bailee seems to be implicit in *R.* v. *Wainwright*.[54]

A third possibility, of course, would be to hold that an asportation is necessary in both types of larceny. This would be both inconsistent with the observations of Donovan J. in *Rogers* v. *Arnott*, quoted above, and unfortunate.

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[52] 9 Cox at 103, *per* Blackburn J.

[53] 29 Cr.App.R. at 39–40.

[54] (1960) 44 Cr.App.R. 190; [1960] Crim.L.R. 494.

It is impossible to conclude without remarking that this case brings out yet another of the subtle and difficult distinctions which abound in the law of stealing and which should surely be removed from our law as soon as possible by a new and greatly simplified definition of larceny and related crimes.

Mr. Sutterthwick's Court

By A. E. JONES, *Magistrates' Clerk*

An old crock

There was a clattering and a jangling as, at the call of his name, Arthur Towzer, "Summonses 23 to 26," got up from where he had been sitting in the waiting hall. Carrying an assortment of iron tubes and metal fittings, he marched firmly towards the appointed place in front of the dock. Sergeant Quing, the warrant officer, regarded him and his burden with considerable mistrust; it had happened once that an irate defendant had thrown something at Mr. Sutterthwick. The court staff did their best to prevent any repetition of that kind of incident; and Sergeant Quing said decisively: "You can leave those things outside, or at the back, sir."

"No, I can't," snapped Arthur Towzer, "They're necessary for my defence." For one moment the warrant officer wondered whether the defendant thought that the magistrate might throw something at him. But when Mr. Towzer added, with some pride, "They're exhibits in my case," the position was clear, and Sergeant Quing had to content himself with seeing that they were deposited on the floor, not too readily at hand.

After the clashing and banging had ceased, the clerk was able to put the charges. Arthur Towzer was a young man dressed in garage overalls, with a keen, pale face and fair hair which was fast disappearing from the top of his head. He was summoned first, for using on a road a motor-vehicle, the steering gear of which was not maintained in good and efficient working order and properly adjusted, contrary to regulations 76 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955; there was a similarly worded charge in respect of the braking system; thirdly, he was charged with using the vehicle when the speedometer was not maintained in good working order, contrary to regulations 74 and 104 of the same Regulations; and the last charge alleged that certain parts and accessories of the vehicle, namely, the front offside mudguard, the bonnet and the front nearside door were in such a condition that danger was likely to be caused to persons on the road, contrary to regulations 73 and 104 of the 1955 Regulations. To all these counts the defendant pleaded not guilty, loudly and defiantly.

The traffic patrol officer, who had come into the witness box when the case was called, had obviously expected this; he had his hand already on the Testament, and, as the last " Not Guilty " was uttered, he embarked on the oath at a speed which came very near the limit.

" Can I raise a point of order, Judge? " said the defendant.

" This isn't a committee meeting, you know," said Mr. Sutterthwick.

" No. I mean this speedometer lark; it's all wrong, Judge; they never ought to have summonsed me for that; it isn't legal."

" You can say everything you want to, in due course; but you must follow the usual procedure in these courts: prosecution first, then defence."

" Anything you say, Judge," said Mr. Towzer, obligingly.

Evidence for the prosecution

The constable's evidence was that his attention had first been drawn to the front wheels of the defendant's car; they were wobbling badly as he drove along. After Mr. Towzer had been stopped, it was found that there were 90 degrees of free play on the steering wheel before the road wheels were affected. The officer paused to explain that 90 degrees were a quarter of a turn, and then went on to relate that the brakes were next tested. It was discovered that with either hand or foot brake fully applied, the car could be pushed along quite easily; but it was conceded that, when both brakes were applied together, there was " some retarding effect." The needle of the speedometer showed 30 m.p.h. while the vehicle was stationary. The dangerous condition of the front mudguard was due to a jagged tear on the edge of it. The bonnet fastenings were rusted away and useless, and the bonnet was only kept in position by string; if the string had broken the bonnet would have fallen off into the road. The front door on the passenger's side was not held by any hinge or lock; it was wired to the frame, but the wire was rusty and appeared brittle through age. If the wire had snapped, the door also would have fallen off, to the manifest danger of other road users. When the offences were pointed out to the defendant, he replied: " Why don't you go and catch some criminals, instead of persecuting respectable citizens."

When he was told that he would be reported with a view to summonses being issued, he said: " I shall fight the case right up to the House of Lords."

Cross-examination by the defendant

" Do you want to ask him any questions? " said Frell to the defendant at the end of this recital.

" Yes, I do. . . . Officer, are you a professional motor mechanic? "

" No ; I am not."

" Well, I am. I've been through my apprenticeship and all the exams, and I know the routine from A to Z. I've spent all my life on cars, and I can tell you. . . . "

" You are supposed to be asking him questions. Speeches come later," interrupted Mr. Sutterthwick.

" O.K., Judge. . . . Well, officer, you admit you've had no training or experience as a car mechanic. . . . "

" I didn't admit any such thing," put in the constable.

" What training and experience have you got, then? "

" I have been through a police course of instruction."

" Just paper work, I'll bet."

" The course covered both the theoretical and the practical aspects," said the officer, with dignity.

" What practical jobs did you have to do? Tell me that? "

" No, officer, don't tell him that," said the magistrate firmly. " I'm not going to have the court's time spent listening to a police instructional course being described in detail. It is quite irrelevant to this case."

" But I want to show that he doesn't know what he's talking about, Judge," protested Mr. Towzer.

" I don't suppose that I should know what he was talking about if he gave particulars of practical work he'd done on cars. I've driven cars for a number of years, but I don't pretend to know much about their mechanism," said Mr. Sutterthwick.

" Well, I don't know how you're going to decide this case then, Judge," remarked the defendant dubiously.

" I shall decide it as I decide all cases—on the evidence."

" I shall be giving a lot of expert evidence, Judge."

" It won't be the first I've heard. And I must point out that so far in this case the evidence has related to certain observable conditions which even I could appreciate. It doesn't need an expert to recognise a quarter of a turn backlash on the steering wheel, or the other matters mentioned by the officer. You'd far better be dealing with the alleged defects he has sworn to, rather than his technical qualifications."

"O.K., Judge; whatever you say. . . . Officer, do you know when my car was first registered? "

"No. I don't."

"Well, here's the log book. You can see for yourself." The defendant produced it from his pocket, and Sergeant Quing handed it to the officer.

"I don't see that this is relevant. I'm concerned with the condition of the car, not its age," said the magistrate.

"It's very important, Judge; as I'll explain in a minute. . . . Officer, you see that the car was first registered before the 1st October, 1937? "

"Yes, I see that."

"That means it doesn't need to have a speedometer at all, doesn't it, officer? "

The witness reflected a moment and then said: "No. It doesn't." Turning to the magistrate he added apologetically: "I didn't think the vehicle was quite as old as that, sir."

"No, the old bus is in pretty good condition, considering," remarked Mr. Towzer complacently.

"I suppose that these alleged offences took place before it was necessary for a vehicle of this age to have a certificate of road-worthiness? " said the magistrate.

"Yes, your worship; just before," replied the officer.

"And I've had it stripped down ever since, waiting for a chance to get it ready for the test. I've had to borrow a van to bring these here parts here today," put in the defendant.

"Returning to the speedometer, I suppose that, if one is fitted, it may still have to be kept in proper order? " said Mr. Sutterthwick.

Frell, who had been hastily thumbing through pages towards the end of Stone's *Justices' Manual*, said: "Regulation 74 only applies to speedometers 'provided in compliance with the requirements of regulation 12'; and regulation 12 only requires them to be fitted to vehicles registered on or after 1st October, 1937. So it is apparently not an offence to fail to maintain a speedometer fitted to a car registered before the 1st October, 1937."

"In that case, I can dismiss that summons straightaway," said Mr. Sutterthwick.

"Thank you, Judge," said Mr. Towzer smugly. "I've been reading that book, Stone's *Justices' Manual* myself, as a matter of fact. It's in the Public Library. There's a lot of good stuff in it, but they won't let you take it out. It's 'Reference' only. Still, I've got some more surprises from it for the police. They needn't think we're a lot of ignoramuses, and they can pretend to know all about the law as well as all about cars, and get away with it."

"Get on with your next question, please, Mr. Towzer," said the magistrate.

"Right, Judge. . . . Now, officer, you say my brakes were no good. Could that have been due to the brake drums? "

"It could have been due to anything—in a car like yours. It was just general wear and lack of maintenance," said the constable contemptuously.

"You never stripped it down to have a look at the brake drums, did you? "

"No ; I didn't."

"So, for all you know, the brake drums were the only things that were wrong? "

Something stirred in the officer's memory, and he began to see where this was leading him. "I think that's most unlikely. There was general wear and lack of adjustment in all parts," he replied.

"But you never stripped down those parts, did you? "

"No."

"Well, how can you be sure, then, that it wasn't only the brake drums? . . . Judge, if you look at page 2904 of Stone's *Justices' Manual*, you'll see it says there that the brake drum isn't part of the braking system. So, if my brakes weren't working properly because the drums were wonky, it isn't the braking system that hasn't been maintained properly. And that's what I'm charged with on this here summons. So I ought to be let off on that one as well."

Mr. Sutterthwick looked inquiringly towards Frell who had consulted page 2904 as soon as it was mentioned. He got up and murmured to the magistrate: "He's quite right about the drums not forming part of the braking system."

Mr. Sutterthwick smiled and murmured back: "This fellow makes rather a refreshing change from the usual run of these motoring cases." Aloud, he said: "I can't say that a doubt hasn't been raised about a vital point in this type of offence, so I must dismiss that summons also. You're two up and two to play, now, Mr. Towzer."

"Thank you, Judge," said the defendant triumphantly, while the patrol officer did his best to look as indifferent to the result of the case as a policeman should.

Mr. Towzer turned again to the witness and said: "Now, officer, I suppose you'll agree that the police can make mistakes."

The constable appeared to have some difficulty in bringing himself to say either " Yes " or " No " to this; but the magistrate cut short the pause with: " Of course they can. I don't need the officer to tell me that."

" Well, in that case, Judge, if the police can make mistakes, surely that must raise a doubt about the rest of the case against me; and the accused ought to be given the benefit of the doubt always—it says so in all the law books," said Mr. Towzer.

" That's not very clever; not up to your previous efforts at all. What I have to decide is not whether the police in general can make mistakes, but whether this particular policeman has made a mistake in this particular case," replied Mr. Sutterthwick.

" Well, he made a big mistake in picking on me," announced the defendant, with a glance towards the public in the back of the court.

" Please don't make comments. Go on with your questioning, if you have any more questions to ask," said the magistrate coldly.

Mr. Towzer fixed his gaze again on the police officer in the witness box and asked: " What do you say was wrong with my steering, officer? "

" A quarter of a turn play in the steering wheel, due to general wear and lack of maintenance," was the reply.

" Well, now, it so happens that I've stripped down all the steering parts and I've brought them along to show the judge that they're perfectly O.K. . . . Can you seen any looseness here . . . or here . . . or here . . . ," and the defendant picked up some of the oddments in front of him and manipulated them vigorously with what appeared to be the hands of a negro. Then he seemed to become aware that it was not his exhibits which were attracting the attention of the bench; " I'm sorry about me hands, Judge. I've come straight from work to do this case, you see," he explained.

" It wasn't exactly an emergency call. You had ample notice of the date of hearing," said the magistrate.

" Yes, I know, Judge. But we're so busy getting all these ten-year-old cars ready for their certificates."

Mr. Sutterthwick said no more, and the defendant asked the witness again: " Can you show me anything wrong in these parts, officer? "

" Why haven't you brought the steering box, as well? " asked the constable, inspecting the display carefully.

" You mustn't ask him questions," put in the clerk swiftly.

" He can ask me questions if he likes. I'm not afraid to answer them," said Mr. Towzer. " I didn't bring the steering box because it was a bit too awkward, and, anyway, there was nothing wrong with it. You didn't find anything wrong with it, did you? "

" I couldn't strip it down, but it seemed to me there was a lot of looseness in it."

" But supposing the car was made with that amount of play; I wouldn't be guilty of lack of maintenance, then, would I? You know it says in Stone's *Justices' Manual*—or perhaps you don't know—that these here Motor Vehicles (Construction and Use) Regulations, 1955, are divided into two parts, and if a car's wrongly constructed that comes under a different category from if it's not maintained properly, don't you, officer? "

" I know that there are offences relating to the construction of motor-vehicles and other offences relating to their use."

" Are you suggesting, Mr. Towzer, that this car of yours was manufactured with a quarter of a turn free play on the steering wheel? It seems an odd trick for the makers to play on purchasers," put in the magistrate.

" Oh, he's exaggerated that—and a lot of other things—in the dock there, Judge."

" It's the witness box he's in—not the dock."

" Sorry, Judge; I'm not used to these places. . . . But he's got to prove his case and not leave any doubt that the car might have been constructed like that, hasn't he? "

" He can prove his case by raising an irresistible inference."

" But, Judge, you must have some free play in the steering wheel, or you could never drive the car. I've never had any trouble with my steering, and it isn't dangerous at all; I'm used to it."

" I'll consider your arguments in due course. Now, unless you want to put some further questions to the officer about the steering, I suggest that you pass on to the alleged dangerous parts."

" Just as you say, Judge. . . . Well, now, officer, you will agree, won't you, that the bonnet and the door didn't fall off, in fact, while I was driving along? "

" No."

" What! You won't agree with that? "

" No—they didn't fall off."

" And a car owner is entitled to do temporary repairs until he can do the job properly? "

" Provided he uses suitable materials, and they are only temporary."

" What do you mean by suitable materials? "

" Well, string isn't one, in my opinion."

" Why not? As long as you keep an eye on it, and renew it when necessary, there's nothing wrong with string. It held my bonnet, didn't it? "

" It had frayed quite a bit."

" I knew all about that, and I should have seen to it in good time. And the same goes for the door. I was watching it. And it's all hooey to say that the wire was all brittle and nearly breaking. It had only been on a few weeks. . . . You didn't try to see if you could make the door fall off, officer, did you? "

" No. I was afraid of what might happen if I shook the car."

" You're just trying to be funny now. . . . Judge, he's no right to insult my car, has he? "

" You must take his answer, and pass on to the next question," said Mr. Sutterthwick.

" All right, then. About this tear in the front wing. How can that be dangerous? "

" Anybody who came into contact with the car at that spot could easily sustain a nasty injury," replied the officer.

" Of course, any silly fool who walks into my car can hurt himself, but that doesn't mean to say that it's a dangerous car."

" The way cars are parked nowadays, people frequently have to walk close to them and brush against them."

" If a man just brushed against the wing his clothes would save him from hurting himself."

" What about a woman with nylons? " said the witness, forgetting the clerk's injunction temporarily.

" The tear was too high to touch a woman's nylons."

" I have seen young people of both sexes going about in shorts and bare legs," remarked the magistrate.

" Well, nobody's ever complained to me that they've done themselves any harm on my wing; and it's been like it a long time," said Mr. Towzer obstinately.

" Have you any more questions to ask the officer? " inquired the clerk.

" No, I don't think so."

Mr. Sutterthwick said: " Now it is your turn to put your case. Do you want to give evidence on oath? "

" No, Judge. I've already said all I've got to say. I don't think I need take the stand."

" We call it ' going into the witness box ' in this country," observed the magistrate.

" Sorry, Judge; they were the only legal words I know."

" Have you any witnesses to call? "

" Oh, I couldn't take the lads away from the garage when they are so busy—not just for this case."

"I take it that that means 'no,'" said Mr. Sutterthwick, and added: "Is there anything more you want to say to me?"

"No. I think I've made my case quite plain, and I think I can rely on you to understand it, Judge."

Verdict and sentence

Mr. Sutterthwick said firmly: "I have no hesitation in convicting you on both the remaining summonses. Clearly the play in the steering wheel was far beyond what is permissible, and was due to wear or lack of maintenance somewhere. It is rather frightening to think that, if avoiding action was necessary in an emergency, there had to be added on to your thinking time the time it would take to turn your wheel through 90 degrees—all split-second intervals, no doubt, but they could be of vital importance. . . . With regard to the wing, the bonnet and the door, I hold that they were all in a potentially dangerous condition. If the legislature bans projecting mascots with sharp points, I am sure that it must also consider jaggedly torn wings as liable to cause injury. The bonnet and door I do not regard as safe under your alleged watchful eye. Nobody can predict for certain when a piece of string or wire is going to break under strain—especially when, as in the case of a car, the strains may be quite unpredictable themselves. These were no temporary repairs. The car had obviously been in the same condition for too long. Perhaps if you devoted a little less time to the study of Stone's *Justices' Manual* and a little more time to keeping your car in good condition, both you and the public would be better off."

"No, it isn't that, Judge," put in the defendant, "It's having to get all these other old crocks through the test that has left me no time for my own."

"Don't interrupt the learned magistrate," hissed Sergeant Quing.

Mr. Sutterthwick resumed: "Whatever the reason, the result is that the public was exposed to danger from your vehicle in a number of ways. You seem to me to be quite irresponsible on the road. You will pay a fine of £5 in respect of each of these two offences. I will give you four weeks to pay. . . . It is some comfort to know that this venerable relic will not be allowed on the road again now until it has been certified fit to be there."

"I shall have to sell the old bus to pay those fines," grumbled the defendant, as he collected up his bits and pieces under the precautionary surveillance of the warrant officer.

Magistrate in the Dock—I

By STANLEY FRENCH, M.A.

Chief Clerk, Thames Magistrates' Court

Sources

John Harriott's autobiography *Struggles Through Life*, first published by Hatchards in two volumes in 1810, is a lively account of his crowded life up to his appointment as first resident magistrate of the Thames Police Office (of which he and Patrick Colquhoun were the projectors), but contains hardly anything, unfortunately, about his experiences on the Bench and as the very active head of the river police.

In the third edition, however, published by Longman Green and Co. in 1815, which is the only one of which copies, and those very few, survive, he devotes a few pages of the additional volume to the ordeal he underwent in 1810, when, as he wrote, "at the instigation of delinquents, whom I had detected and brought forward to answer for various malversations and defalcations of the public money" he was put on trial on charges alleging misconduct in his office of magistrate.

Harriott wrote mainly about the anguish he suffered from these accusations. He mentioned no names and gave hardly any details, but letters, or copies of them, which passed between the magistrates and clerks of the Thames Police Office and the Home Office at the time have survived in letter books now kept at Thames Magistrates' Court and in the Home Office files at the Public Record Office, from which and from the Crown Roll of the trial (K.B. 10, Public Record Office) it has been possible to obtain a fairly complete account of what Harriott described as "my hardest struggle."

First accusations against Harriott

It began in the spring of 1809. The previous year the then chief clerk at the Thames Police Office, H. M. Tomlins, had been compelled to resign following Harriott's discovery that he had been manipulating the accounts of fees and fines to conceal defalcations of over £450. His successor, W. G. Gullifer, had been second clerk for two and a half years and was well thought of.

Either at the time of his dismissal or later Tomlins had thrown out vague accusations that Harriott himself had been guilty of misconduct as a magistrate, and Gullifer, not long after his promotion, used this accusation as an excuse for not producing his accounts to Harriott, whom he declared was not fit to act as guardian of public moneys.

Harriott naturally discussed this strange conduct with his colleagues, Kinnard, who had been a Thames magistrate since 1800, and Longley, who had been but recently appointed.

To Harriott's surprise and dismay Kinnard supported the accusation, perhaps because he resented the way in which the resident magistrate had kept the direction of the Thames Police Force in his own hands, leaving his less forceful and less knowledgeable colleagues to perform routine duties on the Bench.

Harriott's state of mind when he found that the colleague he had known for nine years had joined the two clerks in the conspiracy against him is easy to imagine. Many men, as he said, " would have considered it politic to retreat, and prudent to have secured safety by abandoning the field, allowing the delinquents to pass unnoticed," but such cowardice was completely foreign to his nature, as his enemies ought to have realised. He acted up to his dictum that " the man who is conscious of his rectitude does not skulk to avoid disgrace, but advances to seek it; armed with his integrity, he feels confident of victory," and boldy called upon his accusers to substantiate their charges. More than that, by informing the Secretary of State that they had impugned his official conduct and by demanding an impartial investigation he made it impossible for them to withdraw.

The Home Secretary's response

The Home Secretary, through his under-secretary, Becket, promptly responded to this characteristic gesture by informing Kinnard and Gullifer, in identical letters dated June 26, that " Mr. Harriott having presented to Lord Liverpool that you have made certain charges against him of a very serious nature, tending very materially to affect his character as a magistrate in the Thames Police Office, I am directed by his Lordship to desire that you lose no time in furnishing me with an account in writing of all such charges as you may have to prefer against Mr. Harriott."

This request seems to have caught the conspirators unprepared. When they began their campaign against Harriott they must have believed that the mere threat of accusations would be sufficient to frighten him into a more compliant attitude towards them, and so never expected that they would be put to the proof; envy and hatred, as always, had blinded them to the indomitable character of the man they wished to humble.

They therefore temporised with the Home Office. Kinnard does not appear to have acknowledged the letter and on July 6 received a reminder to put his charges against Harriott into writing " without delay." Gullifer did reply, but gave some excuse for not formulating the charges, which the Secretary of State refused to accept.

Still playing for time, on July 8 Gullifer asked for a copy of the letter Harriott had sent to the Secretary of State requesting an inquiry. He was told that it was not proper that he should have it and was ordered to hurry up with the charges. Kinnard also wrote that day, apparently asking for an explanation of the Secretary of State's request. He was told by Becket that " Lord Liverpool feels himself under the necessity of requiring from you a written statement of what you may have to allege against Mr. Harriott or for a direct denial that you have joined in aiding and abetting Mr. Gullifer in any charge, or in imputing to Mr. Harriott any malversation in his duty." This reply concluded with the tart comment " Of the mode of Investigation of such charges when reduced to writing Lord Liverpool considers himself the proper judge," so that Kinnard was not only trying to get out of any part in an inquiry but presuming to tell the Secretary of State how that inquiry should be conducted.

The Secretary of State's determination to get a clear and prompt response to his request made it out of the question for Kinnard and Gullifer to procrastinate any longer. No doubt they had used the time they had gained, as Harriott said " to ransack every paper, scrutinise into minute circumstance, sift every officer belonging to the institution to catch hold of something or other on which to found a charge," and the result of these researches was conveyed to Lord Liverpool in a letter from Kinnard dated July 13 and one from Gullifer two days later. The latter contained a statement from H. M. Tomlins relating to matters which had come to his notice during his chief clerkship.

On July 27 Becket sent all the correspondence to James Read, the chief magistrate at Bow Street, with a direction that he should sit with two other magistrates, Nathaniel Conant of Great Marlborough Street and Robert Baker of Hatton Gardens, as a committee of investigation before which Kinnard and Gullifer were to produce evidence in support of their charges and Harriott, if it proved necessary, in rebuttal. Notice to hold themselves in readiness to appear before this committee was sent to all three.

The suspension of the Chief Clerk at the Thames Office

On the very day that this was done Harriott and Longley wrote to the Secretary of State to inform him of another unpleasant development. During the previous two or three months the atmosphere at the Thames office must have been very uncomfortable for everyone, because the contending parties could not avoid meeting frequently in the course of their duties. It may be that Harriott and Kinnard managed to see little of one another because the former could be out on his police supervisory duties when it was the latter's turn to sit on the Bench, but the resident magistrate and the chief clerk had to be in constant contact. Harriott seems to have striven to behave as though nothing unusual had happened but Gullifer from the first adopted a rebellious and contemptuous attitude which plainly implied that he had no doubt that Harriott was a guilty man and unfitted to remain a magistrate.

So anxious was Harriott not to do anything which might appear as though he was getting his own back on Gullifer that he endured this outrageous conduct for a long while without complaint, hard though he found it to keep silent. Then the time came when the public interest demanded that it should be tolerated no longer and Harriott and Longley were " under the disagreeable necessity " of suspending the chief clerk. The letter they sent to the Home Office on July 27 set out the reasons. " Besides divers instances of contumacious behaviour," they wrote, " both in manner and words as well as in positive disobedience to our orders, by which the balance of his office cash account has from the middle of May last been kept increasing to a much greater amount than we considered to be prudent or necessary, in open defiance of our written and repeated verbal directions; we have also to state that on investigating his public cash account on Saturday last we found him considerably deficient and unable to produce to us the balance of his said cash account amounting to £94, a considerable portion of which balance he then acknowledged to have used for himself nor did he appear to have more than between £20 and £30 towards making good the said balance of £94 although at the first he asserted he had it all with him.

> " This apparent, and at last acknowledged, deficiency of the public cash so soon after the defalcations of our former Senior Clerk as well as Mr. Gullifer's avowal of his opinion that Mr. Harriott had no right to ask him any questions while the matter was in dispute and contumaciously refusing to answer them when put to him has compelled us to exert our power by suspending him at a period when the Resident Magistrate has forborn much and wished to have avoided everything that had the smallest appearance of vindictive accrimination till after the investigation of the charges against him had been concluded.
>
> " Your Lordship will see by our order that we have transferred the custody of the public cash of the office to Mr. James Fell the Junior Clerk, with whose industry, attention and general conduct

> we are much satisfied; and have directed Mr. Gullifer to pay over the balance in his hands to Mr. Fell. This he has flatly and contumaciously refused to do.
>
> " Our exertions are at present so far paralysed and are in a state of such disorder as to be compelled to repeat to your Lordships our earnest request for a speedy proceeding in the investigation now before you; until the termination of which we much fear it will be out of our power to enforce subordination and conduct the business of this office with vigour and effect."

Hotfoot after this letter came one from Gullifer protesting that the magistrates appeared to have no statutory power to suspend him and giving his reasons for not obeying their commands. This was passed on to the committee of magistrates for inquiry and report.

Committee of investigation at Bow Street

How quickly Read and his colleagues got to work does not appear, but when they did begin they did the job properly, as Harriott admitted, and spent several days making a careful examination of every detail in the affairs of the Thames Office which seemed to have the slightest relevance to Harriott's conduct. When they had finished Harriott was quite happy and awaited their report to the Home Secretary with every confidence that it would vindicate his honour and end his anxiety and distress.

Harriott to stand trial

He never knew, however, what the committee reported. To his surprise and chagrin the Secretary of State told him that, notwithstanding the inquiry, he thought it would be more satisfactory for him if his character was cleared in a court of law and he had therefore directed the Solicitor to the Treasury to receive any charges Harriott's accusers thought they could substantiate and to present them in a bill of indictment.

This was a strange course for Lord Liverpool to take. If the investigating committee had found any misconduct by Harriott it was the Secretary of State's duty to deal with it appropriately, either by dismissal or, if the wrongdoing was criminal, by himself ordering prosecution. If, on the other hand, the committee had found no cause of complaint Lord Liverpool should have put an end to the vendetta and should certainly not have given Harriott's enemies the assistance of the Government lawyers in carrying it into a criminal court. This last aspect particularly angered Harriott because had he had the slightest anticipation that he was to be what he called " metamorphised from a prosecutor into a prosecuted person " he would have got in first by prosecuting his accusers for slander, when he would have himself received help from the Treasury Solicitor, whereas as an accused person he would have to pay his own legal expenses.

For once he had placed his reliance on others when he might have done better to have acted on his own, as he had often done before in the course of his adventurous life. Now it was too late and he was condemned to months of anxious waiting whilst his opponents prepared their case, with at the end an humiliating ordeal of uncertain outcome.

This was a great strain upon him but he had the comfort and support of a loving family and many loyal friends, an unshakable belief in the rightness of his own conduct, the consolation of a religion which convinced him of the ultimate triumph of good over evil, and above all, a valiant spirit. When in due course his accusers had done their worst and the bill of indictment had been presented and the grand jury had found it a true one—Harriott said that they must have been frightened by its length and the large number of counts—he was in good heart. As he was only accused of misdemeanours and was to be represented by counsel he need not have attended the trial but could have waited at home for the verdict. That is what his lawyers advised and his friends begged him to do, because they were afraid of what he would suffer as he heard the prosecution witnesses doing their best to bring him to social ostracism, financial ruin and perhaps imprisonment. He rejected such craven advice, of course, and declared that he would go, whatever pain it caused him, as he never yet knew the enemy he was either afraid or ashamed to meet.

The trial took place in Westminster Hall on June 15, 1810. Although his enemies had undoubtedly directed their researches to the discovery of a fraudulent use by Harriott of the funds of the office, they had found nothing to support a single charge; whatever reasons they had for thinking that they would must have been extremely flimsy.

(*To be concluded.*)

Practice and Procedure

Appeal to House of Lords

Gelberg v. Miller

House of Lords: Viscount Simonds, Lord Hodson and Lord Guest: [1961] 1 W.L.R. 459.[1]

G. was convicted of obstructing a police officer in the execution of his duty. The Divisional Court dismissed an appeal (see above, p. 251) and refused to grant G. a certificate, under section 1 (2) of the Administration of Justice Act, 1960, that a point of law of general public importance was involved in the decision of the Divisional Court. G. petitioned the House of Lords for leave to appeal from the refusal of the Divisional Court to grant a certificate.

Held, refusing the petition, that no appeal lay to the House of Lords from a refusal of the Divisional Court to grant a certificate pursuant to section 1 (2) of the Act.

Per Viscount Simonds: " The whole purpose of section 1 (2) is to ensure that leave to appeal shall not be granted unless it is certified by the court below that a point of law of general public importance is involved." [D. C.]

*Case and Comment**

APPEAL

Criminal Appeal Act, 1907—application of proviso to section 4 (1)—two grounds of appeal decided in favour of accused

R. v. Britton

Court of Criminal Appeal: Lord Parker C.J., Streatfeild and Salmon JJ.: April 24, 1961.[2]

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[1] For G.: *S. E. Brodie* (instructed by Humphrey Razzal & Co.). For the prosecutor: *Paul Wrightson* (instructed by Solicitor, Metropolitan Police). For the Crown (as *amicus curiae*): *J. R. Cumming-Bruce* (instructed by Treasury Solicitor).

* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[2] For the appellant: *W. R. Steer* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *I. H. Morris Jones* (instructed by Harston & Atkinson, Carlisle).

B. was convicted at quarter sessions of being in possession without lawful excuse of forged National Health Insurance Stamps knowing the same to be forged. Section 8 (2) of the Forgery Act, 1913, provides: " Every person shall be guilty of felony . . . who without lawful authority or excuse, proof whereof shall lie on the accused . . . and knowing the same to be forged, has in his custody or possession any forged stamp." The stamps in question had been found in a car driven by B. and B.'s defence was that he did not know they were there. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that the recorder had not left to the jury the question whether B. had possession of the stamps but had, in effect, said that once the stamps were found in the car it was for B. to prove possession by lawful excuse. This direction was clearly wrong but in view of the evidence, this court would have applied the proviso to section 4 (1) of the Criminal Appeal Act, 1907. However, the recorder had also misdirected the jury on the issue of knowledge. It was an ingredient of the offence that the accused must know that the stamps were forged, and the jury had been wrongly directed that B. had admitted such knowledge. If the jury had been properly directed on this issue, they must have found that B. knew that the stamps were forged. However, if this court were to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, on the ground that no substantial miscarriage of justice had actually occurred, the effect would be to apply the proviso twice over, first in regard to the direction on possession, and secondly in regard to the direction on knowledge. This court felt that it would be a very unfortunate precedent to apply the proviso, as it were, twice over and, accordingly, the only proper course was to quash the conviction. [H. P.]

Commentary. If this case decides, as it appears to, that if the prisoner raises two points on appeal and they are both decided in his favour, then the proviso must not be applied, then it is submitted that it is a very unfortunate precedent. There may surely be, *e.g.*, occasions when in the course of a trial items of evidence are wrongly admitted on two separate occasions and yet where it would be proper to hold that no miscarriage of justice has occurred and that the result must have been the same even if the evidence had not been admitted. Similarly where there are two separate inaccuracies in the judge's direction to the jury. No doubt the reasons for not applying the proviso in the present case were good ones; but it is submitted that it is better that the discretion of the court in this matter should not be confined by any rigid rules.

CONSPIRACY

Conspiracy to corrupt public morals—common law misdemeanour—effect of Obscene Publications Act, 1959, s. 2 (4)—living on immoral earnings—publishing an obscene article—Obscene Publications, Act, 1959

Shaw v. Director of Public Prosecutions

House of Lords: Viscount Simonds, Lord Reid, Lord Tucker, Lord Morris of Borth-y-Gest and Lord Hodson: March 13, 14, 15, 16, 20, 21, 22, May 4, 1961.[2]

S. published a booklet entitled the *Ladies' Directory*, which consisted mainly of the names, addresses and, in some instances, photographs of prostitutes. His avowed object in so doing was to assist prostitutes to ply their trades when, as a result of the Street Offences Act, 1959, they were no longer able to do so by soliciting on the streets. In some cases the booklet included details which conveyed to initiates willingness on the part of the advertisers to indulge in various perverse practices. S. received fees from the prostitutes in question, who paid for the advertisements out of their earnings. S. also derived profit from certainly one person to whom he sold copies for resale. On these facts, S. was convicted at the Central Criminal Court of three offences, namely (i) conspiracy to corrupt public morals by conspiring with those who inserted the advertisements in the booklet and with other persons unknown to induce readers thereof to resort to the advertisers for the purpose of fornication and of taking part in or witnessing other disgusting and immoral acts and exhibitions, with intent thereby to debauch and corrupt the morals as well of youth as of divers other liege subjects of the Queen and to raise and create in their minds inordinate and lustful desires; (ii) knowingly living on the earnings of prostitutes; and (iii) publishing an obscene article. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal (i) that the conspiracy charged was a conspiracy to commit an unlawful act. The principle had been established by a long line of cases that conduct calculated to or intended to corrupt public morals (as opposed to the morals of a particular individual) was an indictable misdemeanour, and the conspiracy charged in the present case fell plainly within that principle.

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[2] For the appellant: *W. R. Rees-Davies* and *P. S. C. Lewis* (instructed by Gerald Black & Co.). For the Crown: *Sir Jocelyn Simon, Q.C., S.-G., J. H. Buzzard* and *M. D. L. Worsley* (instructed by the Director of Public Prosecutions).

It had also been argued on this count that section 2 (4) of the Obscene Publications Act, 1959 (which provided that a person publishing an article should not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it was of the essence of the offence that the matter was obscene), precluded the prosecution of S. for the conspiracy charged; but the conspiracy to corrupt public morals did not "consist of the publication" of the booklet, it consisted of the agreement of S. and others to corrupt public morals by means of the booklet. The two offences involved different issues and the verdicts on each need not necessarily have been the same.

(ii) As to the offence of knowingly living on immoral earnings, the principle to be applied was that laid down in *R.* v. *Thomas* [1957] Crim.L.R. 255, and, accordingly, where a man knowingly assisted a prostitute with the direct object of enabling her to carry on her trade and knowingly lived wholly or in part on the earnings of the prostitution which he assisted, he was guilty of the offence. The profit derived from the sale of the booklet was manifestly in essence the money paid by the prostitutes.

(iii) As to the offence of publishing an obscene article, the test of obscenity was that laid down by section 1 (1) of the Obscene Publications Act, 1959, namely, whether the effect of the article was such as to tend to deprave and corrupt persons who were likely to read it. It had been argued that S.'s honesty of purpose was a relevant factor, but obscenity under the Act depended on the article not on the author, and the purpose or intention of the publisher was, therefore, irrelevant. At the trial, evidence had been received on this count of the result of the advertisements, for example, of the ages of the persons resorting to the advertisers and of the objects found at such premises. This evidence, although admissible on the conspiracy count, was not admissible on this count in which the only issue was whether the article was obscene. The jury had not been directed to disregard such evidence when considering this count but, there having been no substantial miscarriage of justice, the conviction should not be set aside on that ground.

There was, therefore, no ground for setting aside the conviction on any of the three counts, but leave to appeal to the House of Lords would be granted in respect of counts 1 and 2.

On appeal to the House of Lords:

Held, (1) (Lord Reid dissenting) dismissing the appeal, that an offence of conspiracy to corrupt public morals existed at common law.

Per Lord Tucker: The Court of Criminal Appeal had dismissed the appeal on the ground that conduct calculated and intended to corrupt public morals was indictable as a substantive offence. Consequently, a conspiracy to that end was indictable as a conspiracy to commit a criminal offence. However, a conspiracy was equally criminal where the acts in question were wrongful in the sense of being calculated to corrupt and deprave public morals and to cause public injury. In the present case, the second alternative was preferable as a basis for the decision but the first was not to be rejected. It had been contended for the appellant that neither fornication nor prostitution was illegal and that, in any event, there was no precedent for holding that such conduct tended to corrupt and deprave adult males. These matters were for the jury and, in this case, the element of willingness to participate in acts of sexual perversion was conclusive against the appellant's submission. However, it was not to be thought that there would necessarily have been no case to go to the jury without this element.

(2) The appeal against the conviction for knowingly living on the earnings of prostitutes should also be dismissed.

Per Lord Simonds: Not every person whose livelihood depends in whole or in part on payment to him by prostitutes for services rendered or goods supplied was guilty of the offence even though it was clear that payment was made out of the earnings of prostitution. Thus, the grocer who supplied groceries and the doctor or lawyer who rendered professional services to a prostitute committed no offence. A person might fairly be said to be living in whole or in part on the earnings of prostitution if he was paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not have supplied but for the fact that they were prostitutes. Where the service rendered was of its nature referable to prostitution, as in the present case, the matter was beyond all doubt. More difficult questions arose in the case of a landlord letting rooms to a prostitute as in *R.* v. *Thomas* (1957) 41 Cr.App.R. 121 and *R.* v. *Silver* [1956] 1 W.L.R. 281. A landlord should not necessarily be said to have committed the offence merely because he let a flat for occupation by a prostitute. A prostitute had to live somewhere, just as she had to eat and drink ; but it was arguable that in a case where the landlord charged an excessive rent the landlord thereby extorted the amount in excess of the normal rent and, accordingly, to that extent knowingly lived on her earnings. However, this was a difficult case upon which no final opinion was expressed. [H.P.]

Commentary. It is clear that an agreement to commit a common law misdemeanour is itself the misdemeanour of conspiracy. Once the Court of Criminal Appeal held that conduct calculated or intended to corrupt public morals is a common law misdemeanour, it followed that an agreement to indulge in such conduct was necessarily a conspiracy. The misdemeanour thus asserted to exist is somewhat vague in definition and may be thought to bear some resemblance to the misdemeanour of public mischief which was "created" by the decision of the Court of Criminal Appeal in *R.* v. *Manley* [1933] 1 K.B. 529. That case was severely criticised as a piece of judicial legislation which opened up "a gloomy vista of indefinite criminal liability." (W. T. S. Stallybrass, 49 L.Q.R. 183.) In *R.* v. *Newland* [1954] 1 Q.B. 158, Lord Goddard accepted the criticism of *Manley* that, "In effect, it would leave the judges to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanour. However beneficial that might have been in the days when Parliament met seldom, or at least only at long intervals, it surely is now the province of the legislature and not of the judiciary to create new criminal offences"; and he concluded that the "safe course is no longer to follow it."

The House of Lords dismissed the appeal on the first count on the ground that a conspiracy to corrupt public morals is indictable as a conspiracy to commit a wrongful act which is calculated to cause public injury and their lordships did not find it necessary to decide whether conduct calculated and intended to corrupt public morals is indictable as a substantive offence. Lord Tucker, with whom Viscount Simonds, Lord Morris and Lord Hodson agreed, emphasised that he was not rejecting the ground relied on by the Court of Criminal Appeal. It would seem, then, that the present law is that there is such a misdemeanour.

The Court of Criminal Appeal was on stronger ground than in *Manley* in two respects. In the first place the authorities are slightly more persuasive. *Manley* depended only on some very broad dicta in conspiracy cases, whereas in the present case the court at least followed decisions on a substantive misdemeanour. In *R.* v. *Grey* (1864) 4 F. & F. 73, *R.* v. *Saunders* (1875) 1 Q.B.D. 15 and *R.* v. *Wallard* (1884) 15 Cox 559, convictions for making indecent exhibitions were upheld where there was no conspiracy charge, expressly on the ground that this was conduct which outraged decency and was injurious to public morals. It is certainly arguable, however, that these were cases of public nuisance, which the present was not. Secondly, the general principle is less obviously objectionable on the ground of its breadth. A public mischief, being any act which tended to the prejudice of the public, was capable of covering almost anything which the judges considered objectionable. The definition of public mischief would indeed appear wide enough to embrace within it any conduct calculated to corrupt public morals whereas there are many public mischiefs—*e.g.*, the conduct of Manley herself—which could hardly be said to have any effect on public morals in any sense. Nevertheless, the principle is wide and general, its application in the present case goes beyond any previous case, and it should be cautiously applied and narrowly watched.

There was no precedent directly in point for the present decision on the conspiracy question but the judges, not unnaturally, disclaimed any intention to create a new offence. As Lord Reid, in his dissenting judgment, said: "Decisions are always authority for other cases which are reasonably analogous and not properly distinguishable." He added:

"But we ought not to extend the doctrine to new fields." Opinions may vary widely on what is, on the one hand, a reasonable analogy or a case not properly distinguishable from well-established authorities and, on the other, what is a new field. It is a matter of degree; as appears from the fact that Lord Reid himself would have upheld the conviction on this count if the jury had been directed to confine their attention to the invitation to the public to resort to the prostitutes for the purpose of certain forms of perversion. This, in his view, was evidence upon which a jury could properly find a conspiracy to outrage public decency. To say or do or exhibit anything in public which outrages public decency, whether or not it also tends to deprave and corrupt, is a substantive misdemeanour in Lord Reid's view. The invitation to perversion was a reasonable analogy in his opinion, but an invitation to ordinary sexual immorality was a new field. But Lord Hodson thought that these "descriptions of sexual eccentricities . . . amount in the main to the use of theatrical trappings usually associated with prostitution and irregular sexual intercourse, but are in themselves neither more nor less unlawful than prostitution itself." Lord Tucker thought that the perversion element was conclusive in the prosecution's favour but added that he was not to be taken as saying that there was no case to go to the jury without that feature. As Viscount Simonds and Lord Morris concurred in this judgment, it is arguable that the point is not concluded and it may, theoretically, be possible to distinguish the present case by pointing to the absence of any element of perversion in a future case. It is thought, however, that the general tenor of their lordships' speeches is such that such a submission would have but slight chance of acceptance.

The analogy most heavily relied on by the court was that of conspiracy to corrupt the morals of an individual. Lord Tucker found in *R.* v. *Delaval* (1763) 3 Burr. 1434 "clear and compelling authority in support of the existence of the crime of conspiracy to corrupt the morals of an individual *and a fortiori of the public*" (my italics). This is an analogy of some force. If it is criminal to agree to corrupt one, how can it fail to be so to agree to corrupt many? But it poses some awkward questions. What of the case (put by counsel) of the book advocating free love? If the mischief of the *Ladies' Directory* was that it encouraged extra-marital sexual intercourse, would not this have the same effect? Moreover, why is it not conspiracy for two prostitutes to agree together to solicit? Prosecuting counsel said in argument: "If a prostitute solicits privately that is no offence, but it is quite otherwise if she advertises generally." Yet if the offence depends on its generality, the analogy from the cases of conspiracy to seduce a particular individual would seem to be misplaced.

In *R.* v. *Newland* Lord Goddard said: "It is much too late to object that a conspiracy to effect a public mischief is an offence unknown to the law. There have been at least three reported cases during the present century in which that charge has been made and convictions upheld. We refer to *R.* v. *Brailsford* [1905] 2 K.B. 730, *R.* v. *Porter* [1910] 1 K.B. 369 and *R.* v. *Bassey* (1931) 22 Cr.App.R. 160. . . ." "Can it be doubted," asked Lord Tucker in the present case, "that a conspiracy to corrupt morals is a conspiracy to effect a public mischief?" The criticism of *Manley* was mainly directed to its extension of public mischief from the realm of conspiracy and its elevation into a substantive offence. Thus, Dr. Stallybrass did not seem to doubt that a conspiracy to effect a public mischief was indictable: (1933) 49 L.Q.R. at p. 185. But this view has not gone unchallenged. Dr. Glanville Williams has examined the cases and concluded that in all of them the alleged conspiracy was an agreement to commit a crime or to defraud. "So far as these cases go, therefore," he concludes, "there is no logical necessity at the present day for a heading entitled 'conspiracy to effect a public mischief.' It is true that some of the cases were actually decided on the broad ground that the conspiracy was to effect a public mischief, but the extreme vagueness of the phrase 'public mischief' makes this an unsuitable rubric for the criminal law, which ought above all to aim at certainty": *The Criminal Law*, 554. This, in effect, is an argument inviting the courts to narrow the *rationes decidendi* of these cases but, until some such step is taken, it is respectfully submitted that they remain authority for the proposition that a conspiracy to effect a public mischief is indictable. As a practical matter, it seems clear that they will be so treated by the courts. It should be observed that in the present case also, the conspiracy involved an agreement to do a criminal act, for the publication was a substantive offence under section 2 (1) of the Obscene Publications Act, 1956. It cannot be doubted, however, that the *ratio decidendi* under the first count was that there was a conspiracy to corrupt public morals.[2a] Once it is accepted that a conspiracy to effect a public mischief is indictable, it follows almost inevitably that a conspiracy to corrupt public morals is also criminal. And, in the light of the traditional attitude of English law to sexual immorality, the spread of prostitution was bound to be regarded as a corrupting of public morality. ("As a matter of fact sexual immorality . . . is the only or almost the only kind of immorality of which the common law takes notice as such": Pollock, *Principles of Contract* (13th ed., by P. H. Winfield), 283; and see Anson, *Law of Contract* (21st ed., by A. G. Guest), 298 and Cheshire and Fifoot, *Law of Contract* (5th ed.), 298.)

Perhaps the most controversial aspect of a controversial case is Lord Simonds's assertion "that there is in that court [the Court of King's Bench and now the High Court] a residual power, where no statute has intervened, to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society." This appears to be a recession from the position taken by Lord Goddard in *Newland* and might afford a justification for public mischief as a substantive misdemeanour.

[2a] Lord Reid said: ". . . as I understood counsel for the Crown, he did not argue that these advertisements were obscene libels and that must mean that merely reading them does not tend to deprave or corrupt—if it did, they would be obscene libels by virtue of the definition in the Act, conspiracy to punish them would obviously be a crime, and the point now in controversy would never have arisen." This is puzzling. Shaw had already been convicted of publishing an obscene article contrary to section 2 (1) of the Obscene Publications Act, 1959, leave to appeal had been refused and there was presumably, therefore, an estoppel between the Crown and Shaw on that issue: *Sambasivam* v. *Public Prosecutor* [1950] A.C. 458 at 479, and see [1957] Crim.L.R. 389–394.

Stephen remarks that "Though the existence of this power as inherent in the judges has been asserted by several high authorities for a great length of time, it is hardly probable that any attempt would be made to exercise it at the present day; and any such attempt would be received with great opposition, and would place the Bench in an invidious position" (*History of the Criminal Law*, iii, 359). Stephen's own view was that "if the protection of society requires the enactment of additional penal laws, Parliament will soon supply them. If Parliament is not disposed to provide punishments for acts which are upon any grounds objectionable or dangerous, the presumption is that they belong to that class of misconduct which it is not desirable to punish." This view, however, does not seem to have prevailed among the judges generally. Professor Seaborne Davies has pointed out: "In the draft Bills prepared in 1852–1854 . . . on the consolidation of the criminal law, a clause was inserted which enacted that after the passing of the Consolidation Acts the common law should be deemed to be repealed in so far as it was co-extensive with the Acts. Practically all the thirteen judges who submitted their views to the Lord Chancellor concentrated their wrath on this clause, pleading vehemently that it would result in the deprivation of the right possessed by the judges under the rules of common law to extend the sphere of the criminal law to cover new types of public mischief as they arise by reference to some general principles of the common law": *Annual Survey of English Law*, 1932, 276–277. Since the common law is what the judges say it is and since they assert that they have such a power, it seems to follow that they do have it. It is interesting to notice that the English judges have recently been taken to task by an American writer for their failure to exercise creative power in the field of public civil law: "The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence" (1961) 61 Columbia L.R. 201, by K. C. Davis. The writer states that he is "acutely aware that my belief that the judicial task should be largely creative is opposed by statements of outstanding English thinkers, early and late, that it is opposed to the views of nearly all English judges, that it is opposed to the possibly unanimous opinion of today's English barristers, that Parliament as now constituted would probably vote overwhelmingly against it, and that it is contrary to the views of nearly all, but not all, members of law faculties in British universities." It may be thought that the criminal law is not the most appropriate field in which to initiate the creative approach.

The Court of Criminal Appeal's answer (approved by the House of Lords) to the defence argument based on section 2 (4) of the Obscene Publications Act, is, with respect, of a rather technical character. The narrow construction adopted of the words, "consisting of the publication," seems to mean that, while no proceedings can be brought for an obscene libel at common law, prosecutions are still possible for a conspiracy to publish an obscene libel (or, possibly, an attempt to do so) although in these cases it is of the essence of the offence that the matter is obscene. Since the publication of almost all obscene libels is preceded by an agreement, this would seem to render section 2 (4) almost totally ineffective. Could not an indictment have been brought against the publishers of *Lady Chatterley's Lover*, for example, of conspiring to publish an obscene libel? Or, indeed, of conspiring to corrupt public morals? On such charges, the defence of public good would not have been available, the expert evidence which played such an important part in the case would have been inadmissible and the result might well have been different. It is submitted that it is very unlikely that this was the intention of Parliament and that the probable object of section 2 (4) was to preclude proceedings for any offence the essence of which was the publication *or intended publication* of obscene matter; but it must be conceded that, if so, the section is somewhat ill-drafted.

As to the test to be applied to the offence of living on the earnings of prostitution, Viscount Simonds and Lord Reid do not seem, in the end, to have been very far apart. Viscount Simonds asks whether the accused is paid by prostitutes for goods or services supplied by him for the purposes of prostitution which he would not supply but for the fact that they were prostitutes; Lord Reid, in holding that the accused's occupation was "parasitic," said: "His occupation . . . would not exist if his customers were not prostitutes." Baron Bramwell pointed out long ago (*Pearce* v. *Brooks* (1866) L.R. 1 Exch. 213) that, in a sense, everything which is supplied to a prostitute is supplied to her to enable her to carry on her trade; even, for example, such elementary necessities as shoes sold to a streetwalker. He suggested a not dissimilar test for application in civil cases: where the thing supplied was necessary or useful for ordinary purposes, the supplier might recover his price even though the thing might also be applied to an immoral purpose; but when the thing was such that it would not have been required at all, except for the immoral purpose, the price could not be recovered.✓

In *R.* v. *Thomas* (1957) 41 Cr.App.R. 121 the Court of Criminal Appeal upheld Pilcher J.'s ruling (and overruled Judge Maude's contrary view—*R.* v. *Silver* [1956] 1 W.L.R. 281; [1956] Crim.L.R. 338) that the fact that a landlord has let a flat to a prostitute at a grossly inflated rent for the express purpose of allowing her to ply her immoral trade, was evidence on which a jury could find that he was knowingly living wholly or in part on the earnings of prostitution, contrary to section 1 (1) of the Vagrancy Act, 1898. The Court of Criminal Appeal held that the present case was not distinguishable on the ground that the charges made for the advertisements were reasonable, the relevance of the inflated nature of the rent being to show that the room was not let for normal accommodation but for the prostitute's professional purposes. In *Thomas*, the room was let to the prostitute only for certain hours each day—roughly from nine in the evening until two in the morning. This arrangement surely made it quite clear that the room was being made available simply for the purpose of prostitution and nothing else; whereas in *Silver* the flats were, apparently, the prostitutes' permanent homes. Pilcher J. chose to attach no importance to this distinction, but it appears that it would be crucial where the rent was not excessive. In the present case Viscount Simonds was not prepared to say that a landlord commits an offence merely because he knows that his tenant is a prostitute and that she will ply her trade in the demised premises: "The prostitute must live somewhere, just as she must eat and drink to live." In the circumstances of *Thomas* it would seem that the offence is committed irrespective of the exorbitance or otherwise of the rent, but in a case like *Silver* it seems that it is essential that there should be evidence of an excessive rent "on the footing that, to the extent to which the rent is in excess of normal, he extorts it from the prostitute on no other ground than that she is a prostitute." While he thought this a tenable view, Lord Simonds expressed no final opinion on it.

It would seem quite possible that the seller of the ornamental brougham in *Pearce* v. *Brooks* might today be held to be living on the earnings of prostitution. This may not be simply an academic problem. The Wolfenden Committee learned of an arrangement between several prostitutes and a car-hire firm whereby the firm made large sums of money out of the use of their cars by prostitutes.

In relation to the third count there is a surprising dictum in the Court of Criminal Appeal to the effect that " If these proceedings had been brought before the passing of the Obscene Publications Act, 1959, in the form of a prosecution at common law for publishing an obscene libel, it would no doubt have been necessary to establish an intention to corrupt." It was held in *R.* v. *de Montalk* (1932) 23 Cr.App.R. 182 and other cases that no intention to deprave or corrupt need be shown in a prosecution for obscene libel at common law; and in *R.* v. *Penguin Books, Ltd.* [1961] Crim.L.R. 176, Byrne J. held that the same principle continued to apply under the Act.

Why the results of the advertisements should have been held by the Court of Criminal Appeal " plainly admissible " in the conspiracy count and inadmissible on the obscene publication count is not clear to the writer. The relevance of the evidence on the conspiracy count was, presumably, to establish the tendency of the publication to corrupt morals. Since precisely the same question seemed to be in issue on the obscenity count, there seems to be no obvious reason why the evidence should not have been equally admissible on that count.

EDUCATION

Education Act, 1944, ss. 39 and 40—failure to attend school—arrival after register closed

Hinchley v. Rankin

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Winn and Lawton JJ.: [1961] 1 W.L.R. 421.[3]

The father of a child of compulsory school age was convicted before the justices for that the child failed to attend regularly at school, contrary to sections 39 (1) and 40 (1) of the Education Act, 1944. The father appealed to quarter sessions.

On the hearing of his appeal, a certificate in accordance with section 95 (2) (*c*) of the Act was produced in evidence, showing that over the period in question the child was present on twenty-seven occasions, and absent on twenty-nine. The time for commencement of the morning session was laid down as 9.15 a.m. Evidence was given that the school attendance register was closed at 9.45 a.m., and that pupils arriving after that time would be marked absent, and shown as non-attendants for that session. The assistant recorder was of the opinion that the oral evidence, coupled with the certificate, showed that there was no real evidence of non-attendance, other than non-attendance before 9.45 a.m., and held that no prima facie case had been made out.

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[3] For the prosecutor: *A. E. James, Q.C.*, and *M. Newell* (instructed by Sharpe, Pritchard & Co. for T. H. Parkinson, Birmingham). For the father: *A. R. Churchill* (instructed by Tuck & Mann for David G. Barnett & Co., Birmingham).

Held, allowing an appeal by the prosecutor, that since the Act provided for full-time education, and required regular attendance for that purpose, the attendance required was for the periods prescribed by the local education authority, so that if a child arrived at school after the register was closed, there was a failure to attend, within section 39 (1) of the Act; and there was, accordingly, a case for the father to answer. [D. C.]

FOOD AND DRUGS

Food Hygiene Regulations, 1955, reg. 9 (e)—use of tobacco while handling food—unlighted cigarette

Pitt v. Locke

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ.: (1960) 125 J.P. 93; 58 L.G.R. 330.[4]

L. was serving a customer with tomatoes from a stall with an unlighted cigarette in his mouth. The cigarette was half-smoked. L. was charged with failing to refrain from the use of tobacco whilst handling open food, contrary to reg. 9 (*e*) of the Food Hygiene Regulations, 1955. The justices, being of the opinion that L. was not " using " tobacco, dismissed the information.

Reg. 9 of the Food Hygiene Hegulations, 1955, provides that " A person who engages in the handling of food while so engaged shall . . . (*e*) refrain from the use of tobacco . . . while he is handling any open food. . . ."

Held, allowing an appeal by the prosecutor, that the justices had taken too narrow a view of the regulation: one of the mischiefs aimed at was ash falling on to food.

Per Lord Parker C.J.: " I particularly do not decide any other questions, such as whether, if a man has a brand new cigarette in his mouth which has not been lit, he could be said to be using tobacco." [D. C.]

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[4] For the prosecutor: *George Mercer* (instructed by E. J. Pitt, Town Clerk, Southwark).

Milk and Dairies (General) Regulations, 1959, reg. 27 (1)—whether binding on distributor of farm bottled milk

United Dairies (London), Ltd. v. Beckenham Corporation

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Salmon and Winn JJ.: [1961] 2 W.L.R. 737.[5]

Distributors of farm bottled tuberculin tested milk were charged with an offence against reg. 27 (1) of the Milk and Dairies (General) Regulations, 1959 (which imposes an obligation to " ensure that every vessel . . . used for containing milk shall, immediately before use . . . be in a state of thorough cleanliness "). The Milk (Special Designation) (Raw Milk) Regulations, 1949, require the producer of such milk to bottle and cap the milk on the farm, and forbid the distributor to break the seals once the bottles are filled and capped. The justices convicted the distributors.

Held, allowing an appeal against conviction, that the obligation imposed by reg. 27 (1) rested, in the case of farm bottled tuberculin tested milk, not on the distributor, but on the producer.

Per Lord Parker C.J.: The words of reg. 27 (1) have a plain meaning: they are dealing with the moment of time immediately before a bottle was filled, and the obligation is placed on the person responsible for the filling of the bottle." [D.C.]

FORGERY

Forgery Act, 1913, s. 8 (2)—mens rea—direction to jury

See R. *v.* BRITTON, above, p. 466.

HOMICIDE

Murder — defence of diminished responsibility — summing-up — failure to review medical evidence—transcript handed to jury

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[5] For the appellants: *Stephen Chapman, Q.C.*, and *Maurice Ahern* (instructed by Scott & Son). For the prosecutor: *R. V. Cusack, Q.C.*, and *James Miskin* (instructed by R. Webster Storr, Beckenham). For the producers: *Christmas Humphreys, Q.C.*, and *Brian Leary* (instructed by Van Sandau & Co. for Latter & Willett, Bromley).

R. v. Terry

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Lawton JJ.: May 8, 1961: *The Times*, May 9, 1961.[6]

T. was convicted at assizes of the capital murder of one P., a bank guard, in the course of a bank raid. One of the defences raised at the trial was that T. was suffering from diminished responsibility within section 2 of the Homicide Act, 1957. Two psychiatrists were called by the defence, who said, in effect, that T. was suffering from abnormality of mind (namely, the delusion that he was possessed by the spirit of a deceased American gangster) induced by schizophrenia, aggravated by drugs and rendered more likely by epilepsy in the family. In the opinion of these witnesses T.'s abnormality was such as substantially to impair his mental responsibility for his acts; they did not think that T. was shamming, whereas the two doctors called by the prosecution were emphatic that T. had throughout been putting on an act for the benefit of the phsychiatrists. The trial judge, summing up to the jury, referred to the words of section 2 of the Act of 1957 and, instead of reviewing the medical evidence, handed to the jury a copy of the transcript of the medical evidence. On appeal to the Court of Criminal Appeal:

Held, that in *R.* v. *Spriggs* [1958] 1 Q.B. 270; [1958] Crim.L.R. 190, this court had laid down that it was sufficient for the judge to hand copies of section 2 of the Act of 1957 to the jury, without any further explanation of the terms of the section. However, since the case of *R.* v. *Rose* [1961] 2 W.L.R. 506; [1961] Crim.L.R. 404, it had not been sufficient merely to refer to the words of the section. The case of *Rose* referred with approval to the interpretation placed upon the section by this court in *R.* v. *Byrne* [1960] 2 Q.B. 396; [1960] Crim.L.R. 763, and the proper course now was to explain to the jury the terms of the section as interpreted in that case. Further, the handing of the transcript to the jury was bad practice and it would be quite impossible for a jury in a jury room without any assistance to understand and appreciate the effect of the evidence. In the present case the matter was made worse by the fact that there was only one transcript, which had been marked by the learned judge in red pencil, and had pages turned down. Such a practice was objectionable and would not ordinarily constitute an adequate direction to the jury. However, in the present case, the real and only question for the jury was: Was T. fooling the psychiatrists or was his story genuine? If T.'s story was genuine, then clearly he was suffering from diminished responsibility within section 2 of the Act. If it was not, then the whole defence of diminished responsibility fell to the ground. In the special circumstances of this case there was little more which the learned judge could reasonably be expected to do; the summing-up was unexceptionable and, accordingly, the appeal would be dismissed. [H. P.]

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[6] For the appellant: *M. A. B. King-Hamilton, Q.C.*, and *J. Bolland* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Geoffrey Lawrence, Q.C.*, and *F. Petre Crowder* (instructed by the Director of Public Prosecutions).

Commentary. In *R.* v. *Spriggs* there were conflicting submissions as to the meaning of diminished responsibility. It was argued by the prosecution that the appellant had a high intelligence quotient and could not therefore be suffering from diminished responsibility. There was medical evidence that the accused lacked ability to control his emotions and counsel for the appellant apparently submitted at the trial that such a condition came within the ambit of section 2 (1). It was argued in the Court of Criminal Appeal that where there were conflicting submissions it was incumbent on the trial judge to give the jury guidance as to which view of the law they should follow. The court dismissed the appeal holding that all that the judge can do is to read the section to the jury and to tell them that Parliament has said that these are the tests that they are to apply. Since construction of statutes is a matter of law and exclusively within the province of the judge, this decision has been criticised as an abdication of responsibility by the judges, which left the jury free to choose between the rival interpretations of the statute which had been advanced: see [1958] Crim.L.R. 191; [1958] Crim.C. & C. 71; 21 M.L.R. 318 and 74 L.Q.R. 173.

In *R.* v. *Byrne* the trial judge directed the jury as to the meaning of section 2 and did so substantially in the same terms as those urged by counsel for the prosecution in *Spriggs*; *i.e.*, that difficulty or even inability of an accused person to exercise will-power to control his physical acts could not amount to such abnormality of mind as substantially impaired his mental responsibility. The Court of Criminal Appeal held that this was a wrong direction and that Byrne's conviction must be quashed. It seems to follow from this decision that *Spriggs* was wrongly decided, for the jury may have elected to follow just such a view of the law as that put before the jury in *Byrne*. The present case, by asserting that it is now necessary for the judge to direct the jury as to the proper interpretation of the section, confirms this conclusion. Spriggs' conviction for capital murder ought to have been quashed.

The court's criticism of the handing of the transcript to the jury is surely justified, particularly in view of the marking in red pencil. Anyone who has taught students with the aid of a casebook which picks out selected passages in heavy type, will appreciate the tendency of the average person to accept the passages which have been picked out for him by one whom he believes to be an expert, to the almost total exclusion of the rest. The judge's markings, being, no doubt, for his own use, could have been very misleading to a jury. But their effect could only be estimated by the court which had the transcript before it.

Murder—successful defence of diminished responsibility—sentence of imprisonment—no order under Mental Health Act, 1959, s. 60

R. v. Morris

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Lawton JJ.: May 9, 1961.[7]

M. was indicted at assizes for the murder of his wife. He was convicted of manslaughter on a plea of diminished responsibility and sentenced to life imprisonment. The medical evidence called for the defence showed that M. was suffering from depression superimposed on a chronic anxiety state which had substantially impaired his mental responsibility; that he required mental treatment and that there was a vacancy available in a local Welsh hospital. The learned judge did not make an order under section 60 of the Mental Health Act, 1959, but sentenced M. to life imprisonment, saying: "I am not at all sure that your mental state is not even worse than that; at any rate, I am not going to have the responsibility of setting you anywhere near liberty. I am going to pass such sentence on you as will involve your being entirely in the hands of the Secretary of State for Home Affairs, who has complete powers to send you to the right place."

Section 60 of the Act of 1959 provides: "Where . . . (*a*) the court is satisfied, on the written or oral evidence of two medical practitioners (complying with the provisions of section sixty-two of this Act), (i) that the offender is suffering from mental illness . . . and (ii) that the mental disorder is of a nature or degree which warrants the detention of the patient in a hospital for medical treatment, . . . and (*b*) the court is of opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section, the court may by order authorise his admission to and detention in such hospital as may be specified in the order. . . ." By section 65 the court has power to make at the same time a restriction order, restricting the discharge of the prisoner from hospital for such period as is specified in the order. By section 72 the Secretary of State is given wide powers with regard to the removal to and detention in hospital of persons serving terms of imprisonment and suffering from mental illness.

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[7] For the appellant: *B. M. Rees* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *R. Manningham-Buller, Q.C., A.-G.,* and *J. R. Cumming-Bruce* (instructed by the Treasury Solicitor).

On appeal to the Court of Criminal Appeal against sentence:

Held, that leave to appeal had been granted in this case in order to consider the question whether the sentence of life imprisonment was wrong in principle having regard to the court's powers under the Mental Health Act, 1959. Although the discretion laid down in section 60 of the Act was very wide indeed, the basic principle must be that, where punishment as such was not intended but the sole object of the sentence was that the prisoner should receive mental treatment until he could safely be discharged, a proper exercise of that discretion demanded that steps should be taken to exercise the powers under section 60 ; and the matter should not be left to be dealt with by the Secretary of State under section 72. Of course, in a case where the particular facts showed that the prisoner had some responsibility for the act done for which he had to be punished, it would be proper to impose imprisonment. In the present case it seemed to this court that the learned judge was not intending to impose punishment and, therefore, it looked *prima facie* as though the sentence was wrong in principle. However, the anxiety of the learned judge appeared to be that he felt that M.'s mental condition might be far worse than that spoken to by his doctors and that he ought to be kept in a hospital where very special steps were taken to ensure that he could not be at large. There was no evidence before the learned judge that there was a vacancy in any such secure hospital and he was clearly not satisfied that the local Welsh hospital was secure enough to enable him to make a hospital order. Accordingly, the learned judge had exercised his discretion perfectly properly on the special facts of this case. The sentence was not wrong in principle and, therefore, the appeal would be dismissed. [H. P.]

Commentary. The objects which judges commonly and properly have in mind when imposing sentence include not only the punishment and reformation of the offender but also—and perhaps predominantly—the protection of the public. This was the consideration which appears primarily to have governed the decision of the judge and of the Court of Criminal Appeal in upholding the decision in the present case.

The court remarks that " in a case where the particular facts showed that the prisoner had some responsibility for the act done for which he had to be punished it would be proper to impose imprisonment." Does not the verdict of manslaughter on the ground of *diminished* responsibility necessarily imply that the prisoner had *some* responsibility for the act done? If his mental state was such as to negative entirely his responsibility, ought he not to have been found guilty but insane? The fact that the prosecution may raise the issue of insanity where the prisoner has put his mental state in issue (*R.* v. *Bastian* (1958) 42 Cr.App.R. 75; [1958] Crim.L.R. 391) supports this view. But in that case it will always be proper and never wrong in principle to impose imprisonment following a verdict based on diminished responsibility.

Yet the next sentence of the report implies that if the judge does not *intend* to punish, a sentence of life imprisonment might be wrong in principle. This would seem to make the rightness of the sentence depend on the motives of the judge in imposing it.

INCOME TAX

"Charitable" transactions—whether real intention was to avoid tax—question for jury

R. v. Soul

Court of Criminal Appeal: Hilbery, Stevenson and Howard JJ.: April 17, 1961: *The Times*, April 18, 1961.[8]

S. was convicted at assizes, *inter alia*, of making false returns to the Inland Revenue authorities for the purpose of evading income tax. S. had approached people with large families, and, by offering gifts of money, had bought property in their names. The property and income, having been bought in other people's names, was not treated as that of S. for income tax purposes and never appeared on his tax returns. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that the question put to the jury was whether these were real transactions intended to pass the legal and beneficial estates in the properties to the persons in whose names they were bought or whether the whole scheme was a fraudulent device for cheating the Inland Revenue authorities. The whole case had depended on the jury's view. There were no grounds for allowing the appeal which, accordingly, would be dismissed. [H. P.]

MISPRISION OF FELONY

Existence of the offence—whether benefit to the accused an element —whether positive act of concealment required

R. v. Sykes

Court of Criminal Appeal: Hilbery, Stevenson and Veale JJ.: January 23, 1961: Lord Parker C.J., Winn and Widgery JJ.: February 13, 1961: [1961] 2 W.L.R. 392.[9]

S. was convicted at a Crown Court of misprision of felony in that, knowing that others had received stolen firearms, he unlawfully concealed the commission of the offence. He was sentenced to five years' imprisonment. On appeal to the Court of Criminal Appeal:

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[8] For the appellant: *Harry Lester* (instructed by Messrs. Beach & Beach). For the Crown: *John Hobsen, Q.C.*, and *J. M. Milne* (instructed by the Solicitor, Inland Revenue).

[9] For the appellant: *John Hugill* (instructed by Church, Adams for Corbett, Wheeler & Corbett, Manchester). For the Crown (on February 13, 1961): *W. D. T. Hodgson* (instructed by the Director of Public Prosecutions).

Held, that (i) the offence of misprision of felony existed and there might be circumstances in which it was essential in the public interest that a prosecution for it should be launched.

(ii) The jury having been directed that the element of benefit to the accused was an ingredient of the offence, it was not open to this court to consider the matter. However, this court was not to be understood as approving or lending any weight to the view that this element was in fact an ingredient of the offence.

(iii) A positive act of concealment was not necessary to constitute the offence. The mere omission to inform the appropriate authorities of a felony of which the accused knew was quite sufficient to justify prosecution and conviction of this offence.

(iv) On the question of sentence, the offence of misprision of felony was a common law misdemeanour so that there was no limit to the sentence of imprisonment which could be passed, save that the sentence must not be inordinate: *R.* v. *Morris* [1951] 1 K.B. 394 and *R.* v. *Higgs* [1952] 1 K.B. 7. However, it seemed to this court that, in view of the fact that the maximum sentence for being an accessory after the fact was two years' imprisonment, it would be impossible to impose a sentence of more than two years. It was unnecessary to decide the question in the present case since S., having been in custody for over ten months, had served an appropriate sentence and would be released. [H. P.]

Commentary. There can be no doubt that the misdemeanour of misprision of felony existed at common law and the question now is whether this crime, " generally regarded nowadays as obsolete or fallen into desuetude " (*per* Lord Goddard C.J. in *R.* v. *Aberg* (1948) 32 Cr.App.R. 144, 146) continues to exist.

There seems to be no doctrine that a common law rule is destroyed by desuetude over no matter how long a period. But the courts have occasionally held that a common law rule has ceased to exist because changed social conditions have destroyed the basis for it. Thus, in *Neville* v. *London " Express " Newspaper, Ltd.* [1919] A.C. 368 at 414, Lord Shaw said of certain examples of the crime of maintenance instanced in Hawkins' *Pleas of the Crown* (I, 456): " Needless to say, these things, once claimed as being part of the common law of England, have long since disappeared. They are repugnant to sensible and modern ideas." Devlin J. cited this passage in *Winchester* v. *Fleming* [1958] 1 Q.B. 259 (reversed on another point [1958] 3 All E.R. 51n.) in which he expressed the opinion that the tort of " harbouring " no longer existed in the modern law because, in the changed social conditions of today, " the bottom has dropped out of the action for harbouring." Again, in the recent case of *Shaw* v. *D.P.P.* [1961] 2 All E.R. 446 at 452 (above, p. 468) Lord Simonds said: " The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society. Today a denial of the fundamental Christian doctrine which in past centuries would have been regarded by the ecclesiastical courts as heresy and by the common law as blasphemy, will no longer be an offence if the decencies of controversy are observed."

It was thus not impossible for the Court of Criminal Appeal (and *a fortiori* the House of Lords) to hold that misprision no longer existed as a separate crime. Its antiquated nature is sufficiently shown by Hale's description of it: "If A sees B commit a felony, but consents not, nor yet takes care to apprehend him, or upon hue and cry levied doth not pursue him, this is a neglect punishable by fine and imprisonment. . . ." The offence was calculated to meet the needs of a society which lacked a proper police force and other law enforcement agencies and it is arguable that "the bottom has dropped out" of it. But there are other rules which are similarly based and which undoubtedly survive (*e.g.*, the rule in *Smith and Wife* v. *Selwyn* [1914] 3 K.B. 98 that an action in tort, where the alleged facts constitute an unequivocal charge of felony, must be stayed until a criminal prosecution has either been brought or rendered impossible).

If misprision is ultimately held to exist, it is submitted that it is important that its limits should be made clear. If a mere failure to report is enough, it is clear that many respectable persons and institutions—banks, schools, universities, trades unions, etc., and their officers—commit the crime regularly. It is no answer to such a point to say that it is only in exceptional cases that a prosecution will be brought. The law-abiding citizen should not have to depend on the benevolent exercise of a discretion for his freedom from prosecution. If the element of benefit is held to be an essential ingredient of the offence, it becomes virtually indistinguishable from compounding, and it is difficult to see what other satisfactory limitation could be imposed.

Professor Radzinowicz (*A History of English Criminal Law*, ii, 465) writes of a proposal made by Edwin Chadwick ("the architect of the new poor law system, . . . a great public health reformer . . . and one of the most imaginative and prolific social inquirers of the nineteenth century") in 1829:

> ". . . his proposal that failure to report crimes should be made an offence was an innovation. He wished to revive the old law of misprision of felony which had fallen into desuetude, and to instil new vigour into it. The solution would be to empower courts of summary jurisdiction to inflict penalties for any failure to inform the police when a crime had been committed. He recognised, however, that the circumstances causing such failure might be so varied, and so difficult to define, that considerable legislative skill would be required to frame a statute under which this obligation could be enforced."

Both the facts (i) that such a proposal could be thought to be necessary in 1829 and (ii) that it was never implemented may be thought significant in relation to the present problem.

OBSCENE PUBLICATION

Obscene Publications Act, 1959, s. 2 (1)—whether jury to be directed that something more than that article was shocking and vulgar was required

R. v. Clifford

Court of Criminal Appeal: Lord Parker C.J., Gorman and Salmon JJ.: April 17, 1961: *The Times*, April 18, 1961.[10]

C. was convicted at quarter sessions of publishing an obscene article contrary to section 2 (1) of the Obscene Publications Act, 1959. The article in question was a magazine entitled "Scanties No. 8." On appeal to the Court of Criminal Appeal against conviction:

Held, dismissing the appeal, that the sole question for the jury had been whether the magazine or part of it was obscene within the meaning of the Act of 1959. It had been suggested that the jury ought to have been directed that, in order to convict, they should be satisfied that the article was something more than shocking and vulgar. Even if there had been a non-direction (and this court was far from saying that there was), one only had to pick up the magazine to feel quite certain that no jury properly directed could conceivably have failed to convict. It was just filth. Accordingly, the appeal would be dismissed. [H. P.]

ROAD TRAFFIC

Driving whilst disqualified—"driving"—whether steering motor-vehicle being pushed constitutes driving—Road Traffic Act, 1960, s. 257

R. v. Spindley

Leeds City Quarter Sessions: G. S. Waller, Esq., Q.C., Recorder: April 11, 12, 1961.[11]

S. a car dismantler, disqualified from driving, was seen apparently driving a Ford van for a short distance along a back street, and stopping it outside his home. The street was level and a cul-de-sac.

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[10] For the appellant: *Malcolm Morris, Q.C.*, and *Michael Sherrard* (instructed by Rex B. Cowan & Co.). For the Crown: *J. H. Buzzard* (instructed by the Director of Public Prosecutions).

[11] For the prosecution: *T. R. Nevin* (instructed by the Town Clerk, Leeds). For the defendant: *A. M. Hurwitz* (instructed by M. Sorkin & Co., Leeds).

S. stated that he had been asked to repair a motor-van which had been left on waste ground some four miles from his home. On starting the engine he found the vehicle was jammed in reverse gear and could only move in reverse. He attempted to free the gear without success. A. was passing in his car and offered him a tow. A. thereafter towed the vehicle, S. sitting in the driving seat and steering with his foot on the clutch, to the entrance to the cul-de-sac. A. then pushed the vehicle because if he had towed it in he would have had difficulty in getting out again. S. steered and finally stopped the van. A. corroborated this account. Counsel for S. submitted that if the evidence of the defence were accepted, that was not "driving." The definition of "driver" in Road Traffic Act, 1960, s. 257, at first sight was wide enough to cover steering a vehicle which was being towed or pushed. It was, however, an exact reproduction of Road Traffic Act, 1930, s. 121, which had received a restricted interpretation. He referred to *Archbold*, § 2837, and *Wallace* v. *Major* [1946] K.B. 473 at pp. 477–478. Driving a vehicle was making a vehicle go. He distinguished *Saycell* v. *Bool* [1948] 2 All E.R. 83, on the grounds that in that case (a) only one man had anything to do with the vehicle, (b) the vehicle travelled 100 yards and (c) the defendant pushed the vehicle downhill and then jumped in and steered; he made it go. *Shimmel* v. *Fisher* [1951] 2 T.L.R. 753; [1951] 2 All E.R. 672, was a case of taking and driving away, an offence akin to larceny, to which different considerations applied. This was further a case *de minimis non curat lex*. He referred to (1960) 124 J.P.J. 212–213. The important part was causing the vehicle to move which S. had not done. Being pushed was not driving.

The prosecution replied that the distance driven did not matter. *Wallace* v. *Major* did not help S. There the vehicle was being drawn not driven. The real distinction was who was in control of the movement of the car. Here S. was in control in that by pressing down the clutch he let the car go. Counsel relied on *R.* v. *Kitson* 39 Cr.App.R. 66; [1955] Crim.L.R. 436, and said that the case was clearly covered by *Saycell* v. *Bool*. It was not a material distinction that in that case the road was downhill and here it was level.

Held (distinguishing *Wallace* v. *Major* and considering *Shimmell* v. *Fisher*), that the fact that propulsion was coming from somebody pushing from behind and not from the force of gravity did not distinguish the case from *Saycell* v. *Bool*. The distinction was highly technical but could not really depend on the contour of the road.

S. then changed his plea to guilty.

The learned recorder held that the matters of defence constituted "exceptional circumstances" which entitled him not to impose a sentence of imprisonment and fined S. £10.

[JOHN M. COLLINS, *Barrister-at-Law*.]

Commentary. In *Saycell* v. *Bool* Lord Goddard C.J., in holding that the accused was driving, remarked that he controlled the vehicle by operating the brakes and steering-wheel, and this factor of *control* would seem to have been the criterion in his mind. In the earlier case of *Wallace* v. *Major* Lord Goddard had conceded that a person steering a towed vehicle is "controlling it to some extent; no doubt he is doing many things which a driver would have to do; but before he can be convicted . . . of being a person driving a motor-car in a dangerous manner, it must be shown he is at least driving it; that is to say, *making the vehicle go*." This would seem to mean that the control must extend to the forward motion of the vehicle. The driver in *Saycell* v. *Bool* clearly had this as he could have stopped the vehicle at any time by applying the brake; whereas the driver in *Wallace* v. *Major* might have been liable to be dragged along by the towing vehicle even if he did apply the brake. *Shimmell* v. *Fisher* differs from the other cases in that the person pushing the vehicle, as well as the person steering, was charged with the offence and, between them, they clearly exercised full control over the vehicle. Where a vehicle is being pushed by manpower it is clearly possible for the person at the controls to stop it at any moment. The case then is not inconsistent with the previous authorities—but the distinction is not a happy one. Regard being had to the mischief of the statute, it might not have been unreasonable to hold that anyone exercising any degree of direct control over the motion of a vehicle is driving it for this purpose.

Dumpers—whether motor-vehicles within the meaning of the Road Traffic Acts

Daley v. Hargreaves

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Salmon and Winn JJ.: [1961] 1 W.L.R. 487; [1961] 1 All E.R. 552.[12]

D. and others were convicted by the Stockport magistrates of various offences against the Road Traffic Acts arising out of their use of two dumpers on a public road forming part of a building estate. The dumpers were four-wheeled, mechanically-propelled vehicles without windscreens, lights, reflectors, horns, wings, number plates, direction indicators, speedometers or driving mirrors and were owned and their drivers employed by contractors engaged on the estate in the ordinary course of construction.

Held, allowing the appeal by case stated, that the prosecution had to prove that the dumpers were motor-vehicles within the meaning of those Acts, *i.e.*, that they were " intended or adapted for use on roads," and that the prosecution did not do this by proving merely that on one occasion the dumpers were being driven along a road: following *MacDonald* v. *Carmichael*, 1941 S.C. 27 in view of the principle stated in *Cording* v. *Halse* [1955] 1 Q.B. 63 ; [1955] Crim.L.R. 43 that it was desirable that there should be a uniform construction of these Acts by the Scottish and English courts.

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[12] For the defendants: *Conrad Dehn* (instructed by Sharpe, Pritchard & Co. for Westbrook, Ince & Co., Hyde). For the prosecutor: *Martin Collins* (instructed by Amery-Parkes & Co. for Bell, Hough & Hamnett, Stockport).

[CONRAD DEHN, *Barrister-at-Law*.]

Commentary. In *MacDonald* v. *Carmichael* the Scottish court gave very careful and detailed consideration to the question confronting the court in the present case. Lord Mackay remarked on the importance of the case as " one applicable to every vehicle of this class in Scotland or in England." Factors influencing the decision were the slow speed of the vehicles, the absence of springs and fitments such as speedometers, mirrors and lamps, which regulations require motor-vehicles to carry, and the fact that, until two years before, the function now fulfilled by these vehicles had been performed by vehicles running on rails which were definitely not motor-vehicles within the meaning of the Act. *Cf. Woodward* v. *James Young (Contractors), Ltd.* [1959] Crim.L.R. 131; [1959] Crim.C. & C. 138; 1958 S.L.T. 289, where a Ferguson motor-tractor, though being used for purposes similar to those of the dumpers, was held to be a motor-vehicle, being designed to perform a much wider range of functions including travelling on roads.

SENTENCE

Borstal training—whether appropriate where it means longer detention than the maximum sentence of imprisonment for the offence

R. v. Amos

Court of Criminal Appeal: Lord Parker C.J., Streatfeild, Glyn-Jones, Ashworth and Elwes JJ.: [1961] 1 W.L.R. 308.[13]

A., who was a young man of nineteen years of age, was convicted before magistrates of obtaining credit by fraud contrary to section 13 (1) of the Debtors Act, 1869. He was committed to quarter sessions for sentence under the provisions of section 28 of the Magistrates' Courts Act, 1952, and then sentenced to borstal training. On appeal to the Court of Criminal Appeal against sentence:

Held, dismissing the appeal, that leave to appeal had been granted because it might be said, in view of this court's previous decisions in *R.* v. *James* [1960] 1 W.L.R. 812; [1960] Crim.L.R. 573; and *R.* v. *Longstreeth* (1952) (unreported), that borstal training was not an appropriate sentence for the present offence, for which the maximum sentence of imprisonment was twelve months. In those cases sentences of borstal training had been set aside where they had been imposed for offences against the Vagrancy Act, 1824. In so far as those decisions implied that it was wrong to impose borstal training where that sentence would necessarily mean a longer period of detention than the maximum sentence of imprisonment for the offence, those decisions were wrong. The powers conferred by section 28 of the Magistrates' Courts Act, 1952, and by section 20 of the Criminal Justice Act, 1948, were not limited in this way and, accordingly, the present sentence would stand. [H. P.]

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[13] For the appellant: *Jane Griffiths* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *R. M. A. C. Talbot* (instructed by Boyes, Turner & Burrows, Reading).

Commentary. It would have imposed a very severe limitation on the powers of justices if they could commit for sentence under section 28 (1) only where the maximum sentence fixed by statute for the offence in question is as great as the period for which a prisoner undergoes borstal training. There is nothing in the wording of the relevant statutory provisions to justify such a limitation. It would now seem to be clear that the sentence of borstal training in *R.* v. *James* was the right sentence and should have been upheld.

It is interesting to note that Lord Parker C.J. who was in both cases stated that he had consulted Hilbery and Diplock JJ. who were with him in the earlier case and that they fully approved of the present decision. Such consultation is, no doubt, common but it is rarely referred to in reported judgments at the present day. The willingness of the court in effect to overrule its own recent, but wrong, decision is, with great respect, to be commended. A rigid adherence to the doctrine of precedent in such circumstances would have been deplorable.

Manslaughter—diminshed responsibility—imprisonment—no order under Mental Health Act, 1959, s. 60.

See R. *v.* MORRIS, above, p. 481.

TRIAL

Inconsistent verdicts—defence of no mens rea

R. v. O'Brien

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Lawton JJ.: May 9, 1961.[14]

O. was charged at quarter sessions on an indictment containing two counts: (i) breaking and entering a dwelling-house and stealing two ladies' jumpers on June 9, 1960; and (ii) attempting to break and enter the same house, June 22, 1960, with intent to steal therein. The jury acquitted O. on the first count and convicted him on the second. On appeal to the Court of Criminal Appeal:

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[14] For the appellant: *R. Davies* (instructed by B. R. Warden Swinfen, Esq., Crawley). For the Crown: *Peter MacNair* (instructed by J. E. Dell & Loader, Shoreham-by-Sea).

Held, allowing the appeal, that O. was a person who delighted in dressing up in ladies' clothes, and it had been his defence that he had taken the jumpers for that purpose and had every intention of returning them. The jury apparently thought that defence might well be true and acquitted him on the first count. There was, however, no evidence at all that made it more likely than not, let alone sufficient evidence to satisfy the jury beyond reasonable doubt, that his intention on June 22 was to take something with the intention of permanently depriving the owner, rather than making another trip for ladies' clothes. This court had come to the conclusion that the conviction on the second count could not stand and, accordingly, that conviction would be quashed. [H. P.]

Commentary. If the only defence on both counts was one of no *mens rea* (*i.e.*, intent permanently to deprive the owner) and the evidence as to *mens rea* in both was the same, it was obviously inconsistent to acquit on the one count and convict on the other.

Summing-up—emphasis on accused's failure to tell police of his alibi when cautioned

R. v. Williams

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Lawton JJ.: May 8, 1961.[15]

W. was convicted at quarter sessions of breaking and entering and stealing clothes. At the trial W. said that he had bought the clothing in question, or some of it, from a man called Paddy; and the jury were directed as follows: " Members of the jury, if there was truth in this story about Paddy, do you not think something would have been said by the defendant in the police station straight away, ' I bought it from Paddy '? Probably the only people who can trace Paddy (if there is such a person) are the police, and if the defendant fails to tell them about how he got these goods, you may wonder why he did not tell them. It may be because there is no such man as Paddy and he knew the police could not trace him. It is for you to say. A person is told he need not say anything when he goes into a police station, but you may wonder, if there is truth in the story about Paddy, why did he not tell the police at the time? " On appeal to the Court of Criminal Appeal:

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[15] For the appellant: *R. Wood* (instructed by Registrar, Court of Criminal Appeal). For the Crown: *I. S. Webster* (instructed by the Town Clerk, Rochdale).

Held, dismissing the appeal, that the question of comment by a court in summing up on the failure of an accused man to give an explanation at the earliest possible moment had been the subject of various decisions of this court. In the most recent case, *R.* v. *Davis*, 43 Cr.App.R. 215; [1959] Crim.L.R. 864, it was pointed out that each case depended on the words used and whether they gave the impression to the jury that, by failing to give an explanation at the earliest possible moment, the accused man must be regarded in some way as confessing his guilt. In the opinion of this court the form of words used in the present case was such as to give the jury the impression that the statement of W. about Paddy was one no reasonable jury could properly accept, particularly having regard to the fact that it had not been put forward at the earliest possible moment. However, on the evidence, any jury properly directed would have convicted; no substantial miscarriage of justice had occurred; and, accordingly, the proviso to section 4 (1) of the Criminal Appeal Act, 1907, would be applied and the appeal would be dismissed. [H. P.]

Commentary. In *R.* v. *Leckey* [1944] 1 K.B. 80 Singleton J. in summing up commented adversely three times on the accused's silence on being arrested and his failure then to declare his innocence. The Court of Criminal Appeal held that this was a misdirection: " If it were not so, a caution might obviously be a trap instead of the means of finding out the truth in the interests of justice. An innocent person might well, either from excessive caution or from some other reason, decline to say anything when charged and cautioned, and, if that could be held out to a jury as a ground on which they might find him guilty, he might obviously be in great peril."

The Court of Criminal Appeal subsequently said that *Leckey* forms the high-water mark of the cases in which convictions have been quashed in circumstances of this kind and that the court was not disposed to extend the decision beyond the facts of that case: *R.* v. *Gerard* [1948] 1 All E.R. 205; 32 Cr.App.R. 132.

There appears to be a distinction between a direction which invites the jury to treat the accused's silence as a confession or admission (which is a misdirection) and one which merely advises them that the accused's silence at the time of the accusation is a factor which they may take into account in determining the weight to be given to any defence which he has subsequently raised. Thus, in *R.* v. *Littleboy* (1934) 24 Cr.App.R. 192, Avory J. commented that it was unfortunate that the accused's defence of alibi had not been mentioned at any stage before the trial and the conviction was upheld, Lord Hewart C.J. remarking: " It is one thing to make an observation with regard to the force of an alibi, and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested; it is another thing to employ that non-disclosure as evidence against an accused person. . . ."

In the present case, therefore, it would seem that it would have been proper to draw attention to the accused's failure to tell his story at an earlier stage as a factor to be considered by the jury in deciding whether to believe the story. The defect in the summing-up seems to have been in attaching too great weight to this factor—*i.e.*, in telling the jury that the accused's conduct had rendered the story one which no reasonable jury could accept.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Burglary—breach of probation

In R. *v.* WILLIAMS the court (Lord Parker C.J., Ashworth and Lawton JJ.: May 8, 1961) varied a sentence of thirty months' imprisonment to one of probation. W., having been placed on probation for burglary, had failed to notify his change of address to the probation officer. He was twenty-three years of age with eleven previous convictions. Lord Parker C.J., giving judgment, said that the sentence had been imposed for the original offence, but the court had to take into consideration the life which W. had led whilst on probation. W. had made a real effort to pull himself together. He had obtained seasonal work in Jersey and had then gone to sea. His reason for failing to notify his change of address was that, at first, he had forgotten and then had become scared and "did not have the nerve to write." In view of the fact that W. had made a real effort, that he had worked well and had been in custody since October, this court would make a fresh probation order for three years.

False pretences

In R. *v.* ROGERS the court (Lord Parker C.J., Finnemore and Howard JJ.: May 17, 1961) reduced a sentence of three years' imprisonment to one of eighteen months' imprisonment for obtaining a cheque from a hire-purchase company by false pretences on the ground that the appellant, who had a bad record, had been doing honest work and doing well since his last release from prison in 1955.

Shopbreaking

In R. *v.* BATES the court (Ashworth, Salmon and Thesiger JJ.: May 15, 1961) reduced a sentence of seven years' preventive detention to one of imprisonment for four years on the ground that the appellant had kept out of trouble for over five years. The court stated that the sentence of preventive detention was not appropriate having regard to the effort which B. had undoubtedly made to go straight between 1955, when he was last released from prison and 1961.

Shopbreaking

In R. *v.* BOYLE the court (Stable, Ashworth and Widgery JJ.: April 13, 1961) varied a sentence of three years' corrective training to one of three years' imprisonment on the ground that there was no report recommending B.'s suitability for corrective training. The court pointed out that as recently as 1959 the prison commissioners had reported that B. was unsuitable for corrective training. B. was a man of twenty-three years of age with seven previous convictions. The present offence was committed when B. broke into a shop and stole £1; and a further offence involving £59 was taken into consideration. The court (Lord Parker C.J., Finnemore and Howard JJ.: May 15, 1961) reduced the sentence to one of eighteen months' imprisonment on the ground that, if this was a case in which the appellant should go to prison rather than corrective training, three years was too long in the circumstances of the case.

[NOTE: The first variation of this sentence was made, as is common practice, upon the appellant's application for leave to appeal and in his absence. The appellant was then informed by the court that he was entited to ask the court for further consideration of his sentence and to be present. Having done so, the sentence was varied as above.]

Shopbreaking

In R. *v.* MORRIS the court (Pilcher, Gorman and Megaw JJ.: May 15, 1961) reduced a sentence of seven years' preventive detention to one of imprisonment for four years. M., who was thirty-three years of age, had fifteen previous convictions. The court stated that, having regard to M.'s age and to the fact that he had only served one long term of imprisonment (three years), there was a doubt as to whether M. had reached the stage where he should be shut away for a long period. The appropriate sentence was one of four years' imprisonment.

Storebreaking

In R. *v*. CULLEN the court (Stable, Ashworth and Widgery JJ.: April 13, 1961) set aside a sentence of seven years' preventive detention for storebreaking and stealing a knife valued at 2s. 6d. and breaking into a school and stealing £5 3s. 0d., and substituted a probation order for three years. Stable J., giving judgment, said that C., who was thirty-five years of age, had spent only three out of the last twenty-five years as a free man. This court had, however, had the advantage of evidence from the probation officer and a report from the prison medical officer. In the result, C. would be given one last chance and would be put on probation for three years with a condition that he should submit to such medical treatment as the probation officer should direct.

Acts and Orders[*]

Dangerous Drugs

Part III of the Dangerous Drugs Act, 1951, provides that it shall not be lawful to import or export any drug to which that Part applies except under licence, and empowers the Secretary of State to make regulations for the purpose of preventing the improper use of such drugs. Certain drugs specified in the Schedules to these Orders are now brought within the provisions of this Part of the Act and other drugs are removed from the provisions of the Act. Both operative May 15, 1961. DANGEROUS DRUGS ACT, 1951 (APPLICATION) and (RELAXATION) ORDERS, 1961 (S.I. Nos. 837 (3d.) and 839 (2d.)).

For penalties for contraventions see section 15 of the Dangerous Drugs Act, 1951.

Section 10 of the Dangerous Drugs Act, 1951, provides that Her Majesty in Council may, if it is thought fit, declare that, following certain action by the Economic and Social Council of the United Nations, the provisions of Part III of the Act (see above) shall no longer apply to the dangerous drugs specified. A number of such drugs are now specified in the Schedule to this Order, and Part III of the Act ceased to apply to these drugs from May 15, 1961. DANGEROUS DRUGS ACT, 1951 (EXEMPTED PREPARATIONS) DECLARATION, 1961 (S.I. No. 838) (2d.).

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[*] Prepared by F. Maurice Drake, Barrister-at-Law.

Factories

This Order prescribes the form of written notice of an accident or dangerous occurrence required by section 64 of the Factories Act, 1937 (as extended by the Dangerous Occurrences (Notification) Regulations, 1947) to be sent to the factory inspector for the district. The form of notice prescribed by this Order is in substitution for that prescribed by the Order of the Minister of Labour dated December 5, 1958, which is revoked. Operative May 24, 1961. FACTORIES (NOTICE OF ACCIDENT, ETC.) ORDER, 1961 (S.I. No. 904) (3d.).

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 718 (Greenwich) (2d.); 719 (Southwark) (3d.); 781 (Holborn, St. Marylebone, St. Pancras and Westminster) (4d.); 782 (Woolwich) (3d.); 807 (Surbiton) (2d.); 820 (Brentford and Chiswick) (2d.); 821 (Ilford) (2d.).

The following Orders have been made prohibiting cycling on footpaths: S.I. Nos. 720 (Amersham and Eton) (3d.); 721 (Coulsdon and Purley) (3d.).

The following Orders have been made detailing lengths of road on which a 40 m.p.h. speed limit applies, and altering the lengths of road on which such a limit applies: S.I. Nos. 722 (Sutton By-Pass, Route A.217; Brighton Road, Routes A.217 and A.297) (3d.); 844 and 845 (Sevenoaks, Redhill Guildford, Route A.25) (each 2d.).

The following Order has been made restricting the use of certain lengths of road by vehicles over a certain weight: S.I. No. 877 (Uxbridge, the bridge over the railway at Peachey Lane, Cowley) (2d.).

The following Order has been made prohibiting the use of a certain length of road to vehicles other than a perambulator, hand cart, invalid carriage or a bicycle or tricycle pushed by hand: S.I. No. 822 (Ware) (2d.).

Certain restrictions with regard to waiting, loading and unloading and on the use of vehicles for the purposes of advertisement in certain streets which were imposed by the London (Waiting and Loading) Regulations, 1958 (S.I. No. 1093), as amended, now apply, by virtue of these Regulations, to additional streets or parts of streets in Camberwell, Croydon, Deptford, Ilford, Kingston, Lambeth, Stepney, Sutton, Surbiton, Tottenham and Wandsworth, and no longer apply in certain streets in Holborn and Woolwich. In the streets in Woolwich where the restrictions no longer apply other restrictions on vehicles as to waiting, loading and unloading now have effect by the Regulations in S.I. No. 778, below. Both operative May 1, 1958. LONDON (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) (NO. 2) REGULATIONS, 1961 (S.I. No. 779) (6d.); LONDON PARKING ZONES (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) (NO. 2) REGULATIONS, 1961 (S.I. No. 778) (6d.).

Temporary restrictions on the sale of goods from vehicles and with regard to waiting, loading and unloading during specified hours in specified places, which were imposed up to May 27, 1961, by the principal Regulations (S.I. 1960, No. 2109) are now extended to October 31, 1961, and to include additional lengths of street in Holborn and St. Pancras; whilst certain streets in Holborn and Westminster are now excluded from the scope of the earlier Regulations. Operative May 1, 1961. LONDON (WAITING AND LOADING) (TEMPORARY RESTRICTION) (AMENDMENT) (NO. 2) REGULATIONS, 1961 (S.I. No. 780) (4d.).

Parking meters are authorised in the City of London and the Borough of Shoreditch. The location of the places at which these meters may be installed is set out in the Schedule, and the Order provides for the times and days during which the parking places are to be in operation, the periods for which the vehicles may be left there, the charges which the Councils may make and the general operation of the parking places. Both operative for preliminary purposes to enable the places to be prepared, April 28, 1961, and for all other purposes, July 24, 1961. PARKING PLACES (CITY OF LONDON) and (SHOREDITCH) (NO. 1) ORDERS, 1961 (S.I. Nos. 765 and 766) (each 1s.).

A speed limit of 50 m.p.h. is imposed on lengths of Trunk Road and Sidcup Road (A.20), Woolwich, in the London Traffic Area, specified in the Schedule. Operative May 19, 1961. LONDON TRAFFIC (50 M.P.H. SPEED LIMIT) REGULATIONS, 1961 (S.I. No. 808) (3d.).

Mines and Quarries

These Regulations, made by the Minister of Power under the Mines and Quarries Act, 1954, replace with amendments the Coal Mines (Explosives) Regulations, 1956 (S.I. 1956, No. 1767). They apply to mines of coal, and relate to the storage, issue, conveyance and use of explosives and detonators and to the appointment, qualifications, equipment and duties of shot-firers at such mines. The principal changes from the provisions of the revoked Regulations relate to (a) the use of approved types of detonators (Reg. 7), (b) the qualifications required for firing shots (Regs. 8, 10 and 11), (c) the care of explosives below ground (Reg. 20), (d) the firing of rounds of more than six shots (Reg. 37), (e) the pulsed infusion method of firing (Reg. 39), (f) the priming of rounds in cross-measure drifts (Reg. 44), (g) the use of delay detonators (Regs. 48 and 54), (h) restrictions on shots in certain parts of mines (Reg. 49), (i) the stemming of shot holes in certain parts of mines (Reg. 55), (j) the re-entry of workmen into staple-pits after shot-firing (Reg. 60), (k) remedial action in the event of a misfire (Regs. 63, 66 and 69). Exemptions, approvals, authorities, etc., granted for the purposes of the revoked Regulations are saved (Reg. 5), and all special regulations varying the application of those Regulations in relation to particular mines have effect as if they referred to the corresponding provisions of these Regulations (Reg. 2 (4)). Operative June 1, 1961. COAL MINES (EXPLOSIVES) REGULATIONS, 1961 (S.I. No. 854) (1s. 3d.).

For penalties for contraventions see section 155 of the Mines and Quarries Act, 1954.

Road Traffic

The Order of 1957 (S.I. 1957, No. 822) is re-enacted with amendments, the main change being that Article 6 provides that parking meters may be capable of being operated by florins and half-crowns as well as by sixpences and shillings. Operative April 20, 1961. PARKING METERS (DESCRIPTION AND TESTING) (ENGLAND AND WALES) ORDER, 1961 (S.I. No. 705) (6d.).

Minor corrections and amendments are made in the principal Order (S.I. 1961, No. 249) which provides for the installation and operation of parking meters in Manchester. Operative May 1, 1961. PARKING PLACES (MANCHESTER) (No. 1, 1961) (AMENDMENT) ORDER, 1961 (S.I. No. 711) (3d.).

The 1957 Regulations (S.I. 1957, No. 1961) which prescribe the procedure in connection with the making by local authorities of orders under sections 26 and 27 of the Road Traffic Act, 1960 (replacing the earlier provisions), are replaced with amendments, the principal of which are: (1) new provision is made that, where a public inquiry has been held into any proposed order which would prohibit the loading or unloading of vehicles on a road during more than six hours in all in any period of 24 hours, a copy of the report of the person holding the inquiry, together with certain other documents, must be sent to the Minister of Transport. Objectors must be informed that this has been done and no such order must be made by the local authority until one month has elapsed since the documents were sent to the Minister, and (2) certain orders under section 26 of the Road Traffic Act, 1960, are excluded from the operation of Part III of the Regulations (Reg. 17). Operative March 24, 1961. TRAFFIC REGULATION

ORDERS (PROCEDURE) (ENGLAND AND WALES) REGULATIONS, 1961 (S.I. No. 485) (6d.).

The Order of 1960 (S.I. 1960, No. 1023 as amended by S.I. 1960, No. 1640) contains provision for excise licences to be taken out for periods of four months in the case of mechanically propelled vehicles for which the annual rate of duty exceeds £3. This Order further amends the 1960 Order by providing that four-monthly licences may now be taken out only where the annual rate of duty exceeds £4. Operative April 18, 1961. ROAD VEHICLES (PERIOD LICENSING) (VARIATION) ORDER, 1961 (S.I. No. 774) (2d.)

A 50 m.p.h. speed limit is imposed on certain trunk roads and during certain periods between May 19 and September 17, 1961, specified in the Order. Operative May 19, 1961. TRUNK ROADS (50 M.P.H. SPEED LIMIT) ORDER, 1961 (S.I. No. 812) (6d.).

For penalties for contraventions, see section 26 of the Road Traffic Act, 1960.

Scotland

The use of a seine net for the capture of white fish in certain waters off the East Coast between Red Head, Angus, and Babbet Ness, Fife, is permitted on certain conditions. Operative April 13, 1961. SEA FISHERIES (SCOTLAND) BYELAW (No. 60), 1961 (S.I. No. 758) (3d.).

Certain local Acts specified in the Schedule are repealed with effect from May 1, 1961, on the coming into operation of provisions of the Betting and Gaming Act, 1960. BETTING AND GAMING (REPEAL OF LOCAL ACTS) (SCOTLAND) ORDER, 1961 (S.I. No. 875) (2d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of Readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

83. *Motor-vehicle—illumination of number plate*

Mr. B. was charged with an offence under Regulation 25 of the Road Vehicles (Registration and Licensing) Regulations, 1955, in that his rear number plate was not illuminated. The Regulations having been made under section 25 of the Vehicles (Excise) Act,

1949. The circumstances of the case were that Mr. B. had driven his car from his home into a neighbouring town. Before he left his home, he had seen that the rear number plate was illuminated. In the town he was stopped by a police constable as he was driving his car away from the pavement where he had picked up his wife. It was then seen that the light illuminating the number plate was extinguished. Mr. B. went to a nearby garage and the mechanic examined the rear light when it was found that one of the wires leading to the bulb holder had become disconnected. The bulb itself was in working order. Mr. B. was charged and pleaded " Not Guilty " to the offence, relying upon the defence provided by section 19 (2) of the Vehicles Act. The magistrates were satisfied that Mr. B. had taken all steps reasonably practicable to prevent the number plate becoming not easily distinguishable. The police argued that the defence afforded by section 19 (2) only related to offences created by sections 17 and 18 of that Act. A charge under Regulation 25 was an absolute offence to which there could be no defence if, in fact, the number plate was not illuminated. The magistrates, however, acquitted Mr. B.

Section 19 (2) of the Vehicles Act, 1949, would appear to create a separate offence and, although the penalty for the first offence is £20, in respect of a second or subsequent offence the penalty is increased to £50, whereas under the Regulations made out under section 25 of that Act, the penalty should not exceed £20, there being no provision for any increased penalty for a second or subsequent conviction.

Would you please let us know whether, in your opinion, the magistrates were correct. [R. P. & Co.]

ANSWER

In my opinion the defence in section 19 (2) of the Vehicles (Excise) Act, 1949, applies to prosecutions under regulation 25 of the Road Vehicles (Registration and Licensing) Regulations, 1955, and the decision of the magistrates was, therefore, correct (see *Printz* v. *Sewell* [1912] 2 K.B. 511 ; 76 J.P. 295). [K. C. C.]

Letters to the Editor

Manslaughter, and Death by Dangerous Driving

Sir,

I subpend a short report of the direction given in a motor manslaughter case, in which I appeared, by Jones J. of our Supreme Court. The direction is of exceptional interest in view of the fact that the only reported direction on " Causing death by dangerous driving " in England since 1956 is that in *R.* v. *Curphey* (1957) 41 Cr.App.R. 78; [1957] Crim.L.R. 191:

> " The degree of negligence required in the case of manslaughter is of the highest kind. It is that kind which shows such complete disregard for the life and safety of other uses of the road as to amount to a crime. This is the kind of negligence for which no compensation can be an answer.
>
> " The degree of negligence required in the case of causing death by reckless or dangerous driving is not necessarily as high as that required to be proved in the case of manslaughter. Nevertheless, it is still of a high nature and it must be shown that the death was due to the reckless driving of the accused.
>
> " In the case of reckless or dangerous driving the degree of negligence required is not necessarily as high as that to be proved in the case of causing death by reckless or dangerous driving. A man may drive his vehicle recklessly and even cause death and yet not be guilty of either manslaughter or causing death by reckless or dangerous driving but guilty of reckless or dangerous driving if the death is not attributable to his recklessness."

(*R.* v. *Bendu*, Supreme Court Sierra Leone, March, 1961.)

Yours faithfully,

BERTHAN MACAULAY,
Barrister-at-Law, Solicitor of the Supreme Court of Sierra Leone.

Offence of Driving While Disqualified Tried With Other Offences

Sir,

At page 274, *ante*, you give an interesting opinion on the question whether a charge of driving whilst disqualified may be tried along with another road traffic offence in a magistrates' court, having regard to *R.* v. *Pomeroy* (1935) 25 Cr.App.R. 147. Some magistrates' clerks get over the difficulty by concealing the existence of the " driving whilst disqualified " charge from the magistrates until the defendant has pleaded, or been found guilty on the other charges. Then this offence can be tried on the same day and by the same Bench.

This course needs only a little care in the preparation of the court list and avoids the prejudice to a defendant which the existence of the " disqualified-driving " charge may cause.

Yours faithfully,

CITY JUSTICES CLERK.

Books and Periodicals

Book reviews:

Administration of Justice in Norway. A Brief Summary. Edited by the Royal Norwegian Ministry of Justice. Oslo. 1957. 145 pp. Available from the Royal Norwegian Embassy. 5s. net.

This little book, while not cutting very deep, is a useful introduction for the visitor to Norway, and tells enough to sharpen the interest. It goes without saying that Norway follows an enlightened liberalism in its administration of justice, yet within this frame of reference there are many divergences from our own ideas. For instance, the Norwegians bring slightly more pressure to bear on the accused to answer questions in court than we do, because the judge expressly asks him whether he is willing to give evidence, and warns him, in case of refusal, that his silence may be construed to his disadvantage (pp. 134–135). If the accused gives evidence, the judge questions him, though with restraint; but the accused is not put on oath, and is not liable to punishment for making false statements. In this respect the Norwegian system is more realistic than ours, as also in the fact that it extends exemption from compulsion not only to the accused's spouse but to his relatives (p. 141). Among the other differences that strike the eye are the adoption of the American practice of submitting instructions for the jury (p. 76), and the provision for new trials (pp. 86–88); there is also an interesting system of shortening criminal proceedings by the defendant paying a stipulated fine without appearing in court (p. 65).

It was a graceful gesture of the Norwegian Ministry of Justice to present the English reader with this introduction to their legal system, which should stimulate closer study of one of the most fruitful areas of comparative law.

GLANVILLE WILLIAMS.

African Homicide and Suicide. Edited by Paul Bohannan. Princeton, New Jersey: Princeton University Press; London: Oxford University Press. 1960. xix and 266 pp. (index) 4 and (appendix) 22 pp. 48s. net.

Criminology in Africa, largely ignored in the past, ranks high in current urgency and interest. This book, a welcome pioneer in its field, reveals some of the difficulties which await the serious student. Dr. Bohannan has assembled contributions from seven distinguished anthropologists, each one writing of an African society with which he or she is closely familiar. The editor bases his own introduction on Durkheim's theories of social integration, instructively juxtaposed with Malinwoski's "institution," and his conclusion is that there is little, if any, egoistic homicide or suicide in Africa, and only a moderate amount of anomic homicide or suicide. The study of crime in Africa demands new attitudes and methods. Criminal statistics, everywhere suspect, are nowhere less reliable than in that continent, where systematic records are a comparatively recent innovation. The student who forestalls white ants and riotous incendiaries often finds records of doubtful value. Suicide figures in most countries are likely to be inaccurate. In parts of East Africa the number of recorded suicides seems to vary in direct proportion to distance from the nearest police post! Dr. Bohannan's contributors are well qualified to meet that difficulty by writing ethnographic descriptions of the societies they study, thus treating homicide and suicide as indices of "patterns of culture." In so doing, they direct towards criminologists the protest of anthropologists at any study involving the comparison of social or cultural facts lifted out of context.

Each chapter here gives tables of figures for the particular society discussed—but the numbers involved over the short period of time involved (mainly the past decade) are too small for statistical analysis. The appendix tabulates details of the 560 homicides and 329 suicides, for many of which brief case-histories are given in the text.

Dr. Bohannan initially summarises his main question: " Do Africans kill themselves and one another for the same reasons and in the same situations as Europeans and Americans? " It emerges that homicide and suicide rates in Africa are strictly comparable with those of Europe, lower than those of America. Recently tribal Africa " is still a solid, relatively stable community in which strife is controlled and the course of life usually predictable. . . . " Rapid Westernisation affects different tribes in different ways: here, creating anomy; there, increasing stability. Motives discussed include, for homicide, fear of the supernatural, social disorganisation (family disputes, etc.) and land disputes; for suicide, loss of social status seems peculiar to men as a motive, along with supernatural fears, disease and domestic problems which also affect women (even the word " domestic " must be redefined in Africa).

The editor recognises that his book barely scratches the surface. The societies discussed were not chosen systematically but with reference to Dr. Bohannan's contacts with workers in the field. Apart from the Tiv of Nigeria, the subjects of study are centred in East Africa, most of them being close neighbours in Uganda and Kenya. There is thus no discussion of ritual murders in Southern Africa, nor of homicide in a modern political background (*e.g.*, Mau Mau), nor of homicide and suicide in Islamic areas. There is little examination of attempted suicide. There are no references to other anthropological or related studies concerning Africa which comment incidentally on the topics dealt with; there is no biblography of the works cited in the text. Finally, legal advice was needed to avoid such inaccuracies as at p. 18:

> " In English law, even today, ' suicide ' is defined as self-destruction by a person of unsound mind. Because such a person is by definition unable to commit a ' crime,' the act cannot be ' punished.' When persons of sound mind kill themselves, it is *felo de se* [*sic*]; it is a crime and may actually be ' punished ' by certain rights which the Crown may exercise against the estate of the deceased."

(Forfeiture had been abolished in English law before the latter was introduced into any of the areas discussed in this book.)

Dr. Bohannan and his colleagues have given us a work stimulating in its subject-matter and its style; the line of studies which it is to be hoped he has initiated by this enterprise may well be of vital importance for the reform of criminal law and penal practice in Africa.

JAMES S. READ.

Books received:

Probation—The Second Chance. By John St. John. London: Vista Books. 1961. 280 pp. (including index and bibliography). 25s. net.

The Australian Police Forces. By G. M. O'Brien. London: Oxford University Press. 1961. xvi and 268 pp. (including appendices and index). 37s. 6d. net.

The Murder of Lord Erroll. By Rupert Furneaux. London: Stevens & Sons, Ltd. ix and 180 pp. 22s. 6d. net.

Time Out of Life. By Peter Baker. London: William Heinemann. x and 251 pp. 21s. net.

The Services of a Solicitor. The Law Society's Guide. By H. J. B. Cockshutt. London: Hodder and Stoughton, Ltd. viii and 127 pp. 2s. 6d. net.

Readers' digest:

Betting and Gaming: The Betting and Gaming Act, 1960 (I): 111 *Law Journal* 300.

Conspiracy: Corrupting public morals: 231 *Law Times* 302.

Magistrates' Courts: Procedure: Pleading guilty by post (another view on *R.* v. *Norham and Islandshire JJ.* [1961] Crim.L.R. 314): 125 *Justice of the Peace* 333.

Merchandise Marks: False trade description, "possession": 231 *Law Times* 257.

Police: The police and the public—Should Watch Committees be abolished?: 125 *Justice of the Peace* 289.

Prostitution: The Street Offences Act, 1959, and after: 4 *The Lawyer*, No. 2, p. 9.

Road Traffic: Road Traffic cases in 1960: 69 *Police Review* 372.

Road Traffic: Under the influence: 125 *Justice of the Peace* 291.

Sentence: Current attitudes to capital punishment—II: 4 *The Lawyer*, No. 2, p. 33.

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1961

THE
CRIMINAL LAW REVIEW

August 1961

Legal aid in criminal cases

The Home Office has issued for the guidance of the courts a circular [1] based on information so far received by the Secretary of State's Working Party on this subject, and appending some observations of the Lord Chief Justice.

The basic principle in the assessment of legal aid fees is that of allowing fair remuneration for the work actually and reasonably done (Legal Aid and Advice Act, 1949, s. 21). Within the limits of this requirement, taxing officers inevitably adopt general standards for their own guidance, but the courts generally regard it as wrong to apply automatically any rules of practice which make no allowance for the circumstances of the particular case. Examples given include treating " a plea " as always justifying the minimum fee only, or limiting defence fees to the amount paid to the prosecution. Indeed, it is pointed out that the work actually done by the defence solicitor will often be greater than that done by any *solicitor* in the preparation of the prosecution case.

Among the views expressed by the Lord Chief Justice in a note to the judges on the assessment of counsel's fees (Appendix B to the circular) are the following: Fees paid to prosecuting counsel are some guide as to the proper fees for defence counsel—but only a guide, though there will in most cases be " no reason for any differentiation." Where a defence junior opposes a leader and a junior on the other side, similar guidance will be obtained by asking what a competent prosecution junior briefed alone might have received. The converse case (defence with a leader, prosecution without) can be approached by asking what fee a competent prosecution leader might have commanded. (We respectfully doubt this last point: if the prosecution problems do not apparently justify a leader, to ask what he might have received is possibly too artificial).

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[1] No. 90/1961.

In an address to a meeting of magistrates (Appendix A to the circular), Lord Parker criticised the practice of some benches of refusing either to grant a defence certificate or to consider an application, without exercising their discretion, so as to leave it open to Quarter Sessions at the trial to exercise the power to assign counsel only. This power is in the nature of an emergency power. The court to which application for a defence certificate is made should exercise its own discretion, resolving any doubt in favour of the applicant. The extract from Lord Parker's address ends with a strong expression of the view that legal aid is desirable in the interests of justice even for prisoners who are going to plead guilty.

Compensation for victims of violent crimes

The report of the working party appointed " to examine the practical problems involved in a scheme for the compensation of the victims of crimes of violence " has been published as a White Paper.[2] It does not purport, and indeed the working party were not asked, to solve the many problems which are raised by the laudable desire to assist the victims of violence. What the working party have done is to point out and analyse the great number of difficulties and to examine two possible types of scheme (namely, a scheme analogous to the Industrial Injuries Scheme, and a scheme for claiming compensation from the State with a right of recourse to the courts).

The difficulties in question are discussed in the light of certain criteria which, the working party think, must be satisfied by any scheme for State compensation. These criteria may be summarised as follows: justification of a scheme which relates solely to the consequences of violent crimes; practicability of distinguishing crimes carrying and not carrying compensation; provision of fair and effective means of distinguishing deserving and undeserving claimants; avoidance of prejudice to criminal justice; absence of ill-effects on National Insurance or Industrial Injuries Schemes; reasonable administrative cost.

Many people have found it easy to call, with reason and force, for assistance for victims of violence, but without thorough analysis of the problems involved or even an appreciation that they exist.

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[2] Cmnd. 1406. For brief review of recent legislative proposals, see [1961] Crim.L.R. 138.

It will be a fine and desirable achievement if the problems can be conquered and a workable scheme devised, but a careful review of the question from all points of view was a necessary first step and the results of that review should have effect as a solvent of excessive optimism.

Prosecution evidence of insanity

A number of articles in this *Review* have investigated the question of the prosecution's right on a charge of murder, to rebut defence evidence of diminished responsibility by attempting to show that the accused was in fact insane.[3]

Mr. Alec Samuels, the author of the more recent of these articles, has called our attention to the fact that in *R.* v. *Morris*[4] the Court of Criminal Appeal were invited by the Attorney-General to give a ruling on this point. The question did not directly arise in that case, but the invitation was, we think, well advised. The reason bears repeating: it is that where a prisoner is found " guilty but insane " against his own contention that he was suffering from diminished responsibility or even that he was simply not guilty of the offence charged, he is ordered to be detained as a Broadmoor patient without possibility of appeal—for " guilty but insane " is the popular expression of a special verdict of acquittal.

The Court of Criminal Appeal declined the invitation. They reserved the point until it arises in the context of a finding of diminished responsibility at the request of the Crown where the prisoner has contended for a finding of insanity. This will be a rarer case. In the meantime serious injustice could result from the combination of two highly technical rules: first, that the " special verdict " is one of acquittal; secondly, that appeal lies only against a conviction.[5] An authoritative statement by the appellate court could have done something to alleviate a disquiet which has been expressed in many quarters.

Evidence of identity: police practice in showing photographs to witnesses condemned

In *R.* v. *Seiga* several photographs, including one of the accused, were shown to a witness after the accused had been arrested. No identification parade was held. The Court of Criminal Appeal regarded the conduct of the detective constable in the case as unsatisfactory. At p. 541, below, we publish a full report and commentary of this important case.

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[3] [1957] Crim.L.R. 521–529; [1960] Crim.L.R. 453–461; [1961] Crim.L.R. 308–313.

[4] [1961] 2 W.L.R. 986; [1961] Crim.L.R. 481 (charge of murder; defence of diminished responsibility; judge refused prosecution leave to call evidence of insanity; verdict of manslaughter; sentence of life imprisonment; appeal against sentence).

[5] *R.* v. *Felstead* [1914] A.C. 534; Criminal Appeal Act, 1907, s. 3.

The length of "life"

In a letter to Mr. Edward Gardner, Q.C., M.P.,[6] the Home Secretary has shown how premature is the demand for legislation to ensure that a life sentence for murder should not in practice last less than twenty-five years, unless a court otherwise orders.

The argument for the proposal, without attempting to do full justice to it, runs thus in its shortest form: In recent years life imprisonment has not, on average, exceeded nine years; murderers are now sentenced for life imprisonment in circumstances in which, before the Homicide Act, 1957, they would have been hanged or detained during Her Majesty's pleasure after reprieve; and murderers should be imprisoned for more than nine years.

The answer, expressed with similar brevity, is simply: The Homicide Act is but four years old; save for those murderers whose early release has been justified by the existence of "circumstances which allow a compassionate view to be taken," it cannot yet be known how long sentences passed under the Act are in practice going to be; and the earlier average of about nine years is therefore in this context uninformative.

The Home Secretary also observes that some prisoners are detained much longer than nine years; that none are released unless there is thought to be no likelihood of danger in releasing them; and that release is only on licence. The important thing is that those responsible for review of these sentences should not regard any particular period as normal. The individual sentence must be reviewed entirely on its own merits and the review affected by nothing in the nature of usages or conventions. So long as this is so, it may be assumed that "life" will be long enough.

Security in prisons

When asked what measures he was taking to improve security in the prisons, the Home Secretary said[7] that the physical security of existing closed prisons was being improved urgently. The present building programme included eight secure prisons for men and one for boys, and nine secure remand homes which would relieve congestion in prisons. Special measures were being taken to lessen the risk of escape by recidivist prisoners serving sentences of more than four years, "many of whom are hardened and resourceful prisoners with a powerful incentive to escape." A number of these men were transferred shortly after this reply was given to a special wing at Parkhurst.

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[6] See *The Times*, July 7, 1961.

[7] H.C. Deb., Vol. 643, cols. *64–66*.

Mr. Butler went on to say that more of this type of prisoner would be sent to what is now Hull borstal as soon as it could be freed for use as a prison, which he expected to be some time during August. Further, a wing at Durham prison would be set aside where a special régime with rigorous discipline would be provided for prisoners who had escaped from closed prisons. In closed local prisons on Saturday mornings (when fewer officers were on duty) work would be restricted to a scale which would allow normal weekday manning in the shops. The Home Secretary reminded the House that the Criminal Justice Bill provides for an increase in the penalty for helping a prisoner to escape, and a new penalty for harbouring an escaped prisoner.[8]

Judicial appointments

Mr. John Thompson, Q.C., has been appointed a Commissioner of Assize on the Midland Circuit.

Mr. Neil Nairn McKinnon, Q.C., has been appointed Recorder of Maidstone.

Mr. Peter Anthony Grayson Rawlinson, Q.C., has been appointed Recorder of Salisbury.

Mr. John Francis Donaldson, Q.C., and Mr. Michael Robert Emanuel Kerr, Q.C., have been appointed Deputy Chairmen of Hampshire Quarter Sessions.

Mr. Robert Michael Oldfield Havers has been appointed Deputy Chairman of West Suffolk Quarter Sessions.

Mr. Edgar Dennis Smith has been appointed Deputy Chairman of Staffordshire Quarter Sessions.

Mr. Neil Martin McElligott has been appointed a Metropolitan Stipendiary Magistrate. He has relinquished his Recordership of King's Lynn.

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[8] Now s. 22 (1) and (2) of the Criminal Justice Act, 1961.

Specific Intent

By RUPERT CROSS, D.C.L.

The object of this article is to draw attention to an ambiguity in the use of the phrase "specific intent," and to the uncertainty of the law governing cases in which it is said that such an intent must be proved. In order to do this, it will be necessary to refer to three of the main types of criminal intent.

Three main types of criminal intent

If we confine the discussion to cases in which the question is whether the accused intended that a particular consequence should follow from one of his acts, there are three situations in which an affirmative answer would be plausible. In the first place, the accused may have acted with the object of producing the consequence; secondly, he may have realised that it was highly probable that the consequence would result from his conduct, although he did not act in order to produce it, and may even have hoped that it would not occur; finally, the accused may have acted in such a way that any sane and sober adult must almost necessarily have realised that his act would result in the consequence in question. In the third situation, the accused is often said to have had a "presumed intention." There is no recognised terminology for distinguishing between the types of intention exemplified by the first and second situations, but Bentham spoke of a "direct intention" in the first case, describing the second as "oblique intention,"[1] and these expressions will be used in this article. Foresight of the consequence as a likelihood was sufficient to constitute an oblique intention for Bentham. Other writers have preferred to say that the consequence must have been foreseen as a certainty[2] but, as Lord Porter has said, men's actions and judgments are not founded on certainty. "No doubt a high degree of probability is required, but no more."[3] There is no ground for the fear that intention and recklessness will become confused if the language of probability is used to describe oblique intention. "Recklessness" with regard to a foreseen consequence connotes the unjustified assumption of a risk, not the state of mind of someone who has reckoned that his conduct would have a particular result and nonetheless acted in such a way as to produce it.

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[1] *Principles of Morals and Legislation*, Harrison's edition, 1960, p. 202.

[2] Glanville Williams, *Criminal Law* (*the General Part*), s. 13.

[3] *Lang* v. *Lang* [1955] A.C. 402 at p. 429.

In some branches of the criminal law, murder, for example, liability may be based either on a direct intention, or on an oblique intention or on a presumed intention. Thus, Stephen defined malice aforethought as including (a) an intention to cause the death of, or grievous bodily harm to, any person, and (b) knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person,[4] while *D. P. P.* v. *Smith*[5] shows that the accused is guilty of murder if he was unlawfully and voluntarily doing something to the deceased which a reasonable man must have known would result in death or grievous bodily harm. In the case of other crimes, unlawful wounding for example, liability is based on direct or oblique intention or recklessness. The definition of some offences such as burglary and rape can only be satisfied if a direct intention is proved against the accused, and there are crimes, of which wounding with intent is one, with regard to which it is difficult to say what state or states of mind will suffice as a basis of liability.

What is meant by the statement that the definition of some crimes requires proof of a "specific intent"? Does it mean that proof of either a direct or an oblique or even a presumed intent will suffice, or does it mean that a direct intent and nothing less must be established? It is impossible to give a single answer to this question because the phrase "specific intent" is used in different senses in two leading cases, *D. P. P.* v. *Beard*[6] and *R.* v. *Steane*.[7] After these cases have been considered, reference will be made to the treatment of *R.* v. *Steane* in *D. P. P.* v. *Smith* and some uncertainties in the present law will be pointed out by way of conclusion.

D.P.P. v. Beard

Beard killed a child in the course of raping her. He was therefore guilty of murder under the law as it stood before the Homicide Act, 1957, came into force, unless he could establish some such defence as drunkenness which he in fact pleaded. The intention to commit rape constituted malice aforethought, and it was, at the time, unnecessary for the prosecution to prove any kind of intention to kill or to cause grievous bodily harm. Beard was convicted of murder. He successfully appealed to the Court of Criminal Appeal, but his conviction was reaffirmed by the House of Lords. The

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[4] *Digest of the Criminal Law*, 9th ed., art. 264.

[5] [1961] A.C. 290; [1960] Crim.L.R. 765.

[6] [1920] A.C. 479.

[7] [1947] K.B. 997.

Court of Criminal Appeal considered, on the authority of *R.* v. *Meade*,[8] that the jury should have been directed that it was a defence for the accused to show that his mind had been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury. The House of Lords held that *Meade's* case did not apply to the facts with which they were concerned in *Beard's* case. Meade had killed a woman by brutally assaulting her. He was convicted of murder and his conviction was upheld by the Court of Criminal Appeal because the trial judge's summing-up had made it clear that the jury could only find the accused guilty of murder if satisfied that he was not so drunk as to be incapable of realising that what he was doing was dangerous. Lord Birkenhead expressed the distinction taken by the House of Lords in *D. P. P.* v. *Beard* in the following words: " In *Meade's* case the crime charged was that death arose from violence done with intent to cause grievous bodily harm. In this case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's* case, therefore, it was essential to prove the specific intent; in *Beard's* case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape." [9] Lord Birkenhead added that he did not think that the proposition of law deduced from the earlier cases on drunkenness was an exceptional rule applicable only to cases " in which it is necessary to prove a specific intent in order to constitute the graver crime—*e.g.*, wounding with intent to do grievous bodily harm or with intent to kill." He had previously stated the effect of the earlier authorities on drunkenness in the following terms: " Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent." [10] These quotations show that, throughout Lord Birkenhead's speech in *Beard's* case, the phrase " specific intent " was used to describe whatever intent the prosecution may have to prove in the case of the particular charge to which drunkenness is pleaded as a defence. Very different was the use of the phrase in the judgment of the Court of Criminal Appeal read by Lord Goddard C.J. in *R.* v. *Steane*.

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[8] [1909] 1 K.B. 895. On facts similar to those of *Meade's* case ought the jury now to be directed to consider whether the accused was so drunk as to be incapable of forming the intent to do grievous bodily harm, or should they be directed to consider whether the accused was so drunk as to be incapable of forming the intent to do an act which a reasonable man must, in the circumstances known to the accused, have realised would be likely to cause grievous bodily harm? The relationship between *D. P. P.* v. *Beard* and *D. P. P.* v. *Smith* may some day require elucidation so far as the defence of drunkenness is concerned.

[9] [1920] A.C. at p. 504.

[10] At pp. 501–502.

R. v. Steane

Steane was charged with doing acts likely to assist the enemy with intent to assist the enemy. He had broadcast for the Germans during the last war after threats had been made against himself, his wife and children. Henn-Collins J. in effect directed the jury that, if they were satisfied that the accused had done acts likely to assist the enemy, the intent to do so might be presumed. Steane was convicted, and his appeal was allowed because the jury had not been properly directed with regard to the necessity of their being satisfied that he in fact intended to assist the enemy. Lord Goddard said " in many offences a specific intention is a necessary ingredient and the jury have to be satisfied that a particular act was done with that specific intent, although the natural consequences of the act might, if nothing else were proved, be said to show the intent with which it was done." [11] Lord Goddard illustrated this point by referring to charges of wounding with intent to do grievous bodily harm contrary to section 18 of the Offences Against the Person Act, 1861, on which, even if it is proved that the accused severely wounded the prosecutor, there can only be a conviction if the Crown proves that the accused's intent was to do grievous bodily harm. It is always open to the jury to return a verdict of unlawful wounding contrary to section 20 of the Act. A further illustration was that of a prisoner charged with wounding with intent to murder. " Here again the prosecution may fail to satisfy the jury of the intent although the natural consequence of the firing, perhaps at close range, would be to kill. The jury can find in such a case an intent to do grievous bodily harm, or they may find that if the person shot at was a policeman, the prisoner was not guilty on the count charging intent to murder but guilty of an intent to avoid arrest."

No mention was made of the effect of the accused's knowledge that his broadcasting probably would render some assistance to the enemy, but the Court of Criminal Appeal seems to have considered that nothing short of a direct intention to assist the enemy would suffice for a conviction in such a case. Lord Goddard's illustrations also suggest that a direct intention must be proved on charges of wounding with intent to do grievous bodily harm and shooting with intent to kill. Lord Kilmuir's speech in *D. P. P.* v. *Smith* certainly lends support to the above statement of the effect of the decision in *R.* v. *Steane*, although the position is not so clear so far as charges of wounding or shooting with intent are concerned.

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[11] [1947] K.B. at p. 1004. It seems that the import of the word " specific " was, for Lord Goddard, that the intent must be specified in the indictment. But there are cases in which liability is said to depend on proof of a specific intent in which no particular intent need be alleged in the indictment.

The treatment of R. v. Steane in D.P.P. v. Smith

Smith was convicted of the capital murder of a police officer acting in the execution of his duty. The officer had been clinging to the car which Smith accelerated, and the jury were directed that the accused was guilty if he must, as a reasonable man, have contemplated that grievous bodily harm would result to the officer. The Court of Criminal Appeal substituted a verdict of manslaughter, after placing great reliance on the following passage from the judgment in *R.* v. *Steane*: " No doubt if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted." After citing this passage in the House of Lords in *Smith's* case, Lord Kilmuir said that *R.* v. *Steane* was a very special case in which " over and above the presumed intent there had to be proved an actual intent or, it might be said, a desire by the appellant to assist the enemy." [12]

Smith's conviction for capital murder was restored by the House of Lords. One way of describing the effect of the decision is to say that, in all murder cases in which the accused was unlawfully and voluntarily doing something to the deceased, provided he knew of the circumstances rendering his act one which was likely to kill or cause grievous bodily harm, he is conclusively presumed to have intended these results. Clearly Lord Kilmuir considered that a presumed intent would not support a conviction on charges such as that with which *R.* v. *Steane* was concerned, and his reference to the need of an actual intent or desire in such cases seems also to suggest that proof of an oblique intent would be insufficient. Lord Kilmuir's " actual " intent is synonymous with Bentham's " direct " intention and we thus have a division of crimes into those in which a direct or actual intent must be proved, and those in which something less will suffice. The difficulty is to ascertain which crimes come into the first category.

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[12] [1961] A.C. at p. 332.

Uncertainty of the law

No doubt the difficulty is partly due to the ambiguous use of the phrase " specific intent." Crimes requiring proof of a specific intent are often distinguished from other crimes. If we consult *D. P. P.* v. *Beard* for the meaning of this distinction, we are forced to the conclusion that it is meaningless because of the broad use of the phrase " specific intent." If, on the other hand, we consult *R.* v. *Steane* and *D. P. P.* v. *Smith* we reach the conclusion that " specific " is synonymous with " actual " intent. Clearly the intent to kill or cause grievous bodily harm upon which the law of murder is based is not specific in this last sense although it was spoken of as a specific intent in *Beard's* case. The intent to kill or cause grievous bodily harm which must be proved in prosecutions under section 11 and section 18 of the Offences Against the Person Act, 1861, was said to be specific both in *R.* v. *Steane* and in *D. P. P.* v. *Beard*, but can it be said to be finally settled that an actual intent must be proved on these charges? For example, if the police officer had not been killed in consequence of being thrown off the accused's car, would Smith have been guilty of unlawfully and maliciously causing grievous bodily harm with intent to do grievous bodily harm? He certainly had no actual intent to do grievous bodily harm as his sole object was to avoid arrest,[13] but if the jury had concluded that he knew that it was extremely likely that grievous bodily harm would result from his conduct, would that have been enough to secure a conviction? An argument could be based on *Smith's* case to the effect that a presumed intent suffices under section 18 as Lord Kilmuir characterised the appeal as one which raised the question as to what is the proper direction to be given to a jury in regard to the necessary intent which has to be proved in cases of murder and also in cases under section 18 of the Offences Against the Person Act, 1861.[14] It is, however, most likely that Lord Kilmuir was thinking of the definition of " grievous bodily harm " which he considered should be the same in each case. Even if a presumed intent will not suffice, the question whether a direct intent is the only possible basis of liability under section 18 seems to be a fairly open one. It is not only in the case of statutory offences against the person that such a question may arise in the future.[15]

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[13] In some cases the accused may have had an actual intent both to do grievous bodily harm and to resist arrest (see *R.* v. *Gillow* (1825) 1 Moo. 85), in that event there is no doubt that he can be convicted on an indictment charging him with either intent. There is no need to determine which of the two was dominant.

[14] [1961] A.C. at p. 324.

Magistrate in the Dock—II

By STANLEY FRENCH, M.A.
Chief Clerk, Thames Magistrates' Court

(*continued from p.* 465)

The indictment: twenty-two counts

Nevertheless, they produced to the Treasury Solicitor enough evidence of other kinds of misconduct to persuade him to put twenty-two counts in the indictment. Harriott said there were fifty-three, an inexplicable exaggeration. He also gave the length of the indictment as over fifty feet. This is no exaggeration. The roll of the trial consists of twelve parchment sheets twenty-three inches long, written on both sides, and a thirteenth sheet partly used, but a good deal of this space was taken up by the pleonastic legal language of the age.

For two counts Harriott's accusers resurrected an incident over six years old, when, they alleged, Harriott had on June 1, 1804, used a public sailing boat for the conveyance of five seafaring men whose names were unknown from a ship at Wapping, called the *Lady Jane Dundas*, so that they could escape impress into the King's Service, to which he knew they were liable, " with intent to hinder and prevent the King's officers from impressing them," according to one count, and " to the prejudice of the Naval Service," according to the other.

For the remainder of the charges, Gullifer and his collaborators sought for instances of the graft and nepotism which had been so rampant in the previous century, and found sufficient superficial signs of them to enable them to attack him through his business and his family.

Repair of a police boat—Harriott's " interest "

In May 1805 one of the police sailing boats had been in need of repair. To ensure that the work was done properly and quickly, Harriott gave the job to men employed in a pump factory, because they were more highly skilled than the type of craftsmen usually employed on such work. They were also higher paid but Messrs. Harriott, Hurry and Company sent in a very reasonable bill for the job; indeed the £109 14s. 6d. they claimed was probably an undercharge. This was also true of the charge for two other jobs the firm did for the Thames Police Office—a small one of £8 18s. 9d. in September 1805 for making an oak cistern and doing other work in connection with a drain, and a large one of £107 1s. 8½d. in March 1807 for more repairs to boats.

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[15] The problem can arise in relation to treason and attempts, see " The Mental Element in Crime," by Glanville Williams, 27 *Revista Juridica de la Universidad de Puerto Rico*, 1957–8, p. 192. The question whether an oblique intent will suffice for aiding and abetting lay at the root of the difference of opinion in the Divisional Court in *N.C.B.* v. *Gamble* [1959] 1 Q.B. 11.

In themselves there was nothing wrong about these transactions but the bills submitted to Harriott as resident magistrate had in each case one noteworthy omission; they concealed the fact that Harriott was himself the employer of the men who had done the work by leaving his name out of the firm's description and citing it as "Messrs. Hurry and Co."

This can have deceived no one connected with the Thames Police Office. It was well known that Harriott had continued his financial interest, though not active participation, in a business he had established, shortly before his appointment as resident magistrate, for the production of a ship's pump he had invented and patented. According to him, the absence of his name from the billhead was accepted as a matter of course by all who knew about this transaction. He said that he considered himself fairly justified in the omission "the motive being nothing more or less than a mistaken pride, as an old military officer, in not liking that my name should appear as a blacksmith or carpenter, for common work, which I permitted to be done expressly and avowedly for the benefit of the office." Such pride was so much in character that one cannot doubt that it was the main cause of the omission, but there may have been another which Harriott, despite his usual straightforwardness, preferred not to mention—that his name on the billhead might have caused the Home Office, which had to approve the expenditure, and the Treasury, which provided the money from which it was met, to ask questions about it which would have involved him in troublesome explanation and perhaps led to Governmental criticism of his continued association with trade.

However innocent the motive, on the face of it the omission of his name was suspicious enough to need inquiry and the bill of indictment therefore contained three charges that Harriott, as a special justice at the Thames Police Office, "unlawfully and corruptly employed and caused to be employed himself and his copartner in the Trade and Business aforesaid to do and perform certain work and labour . . . to be paid for by the Receiver and did conceal and withhold from the knowledge of the Receiver, and of our said Lord the King that he was one of the persons so employed."

Charges involving Harriott's son

The next three charges arose from his young son George's employment in the office of a solicitor, John Wright Unwin. The allegation here was that he had entered into a corrupt bargain with Unwin that "he would retain and employ [him] and cause and procure [him] to be retained and employed to manage and conduct divers prosecutions connected with and arising out the business" of the Thames Office and that on his part Unwin had undertaken that after each case he would pay something to George out of the fees he received from the Receiver on Harriott's certification. According to the indictment this bargain had been kept twice, both on May 1, 1805, when George received £5 out of the fee of £54 10s. paid to Unwin in the case of one Hagen, and £3 3s. out of £12 14s. 1d. he had received for prosecuting a man named Paterson. These constituted the fourth and fifth charges and a sixth alleged in general terms that Harriott had corruptly employed Unwin in the business of the office in the expectation that George would get part of his fees.

These were indeed serious allegations which Harriott could rebut only by showing either that no such agreement had ever been made or, that its existence had not led to the improper employment of Unwin or to his being allowed excessive fees.

The "shawl and muslin" charges

The third group of charges brought in Harriott's sister Hannah. On May 30, 1807, one of the Thames officers had searched a house at Bromley-by-Bow and had found therein a shawl and a piece of muslin, said to be worth the considerable sum of £30. The occupant of the house, Mary Coxo, was brought before Harriott on a charge of unlawful possession and he ordered the forfeiture of the goods and of their sale if the owner could not be found within a prescribed time. The proceeds of such a forfeiture were required by Act of Parliament to be paid to the Exchequer less any part due to an informer. After two months the shawl and the muslin had not been claimed and Harriott sold them, so it was alleged, to Hannah for £17 6s. 6d., "to the great loss and damage of our said Lord the King." There was no suggestion that the sum so received was not properly allocated.

Out of this transaction the framers of the indictment managed to make no fewer than eight charges. They accused Harriott, amongst other things, of " corruptly devising and intending to obtain goods for himself at a price below their value and causing them to be so bought," of causing the goods to be privately bought, of aiding and abetting his sister to buy goods of foreign manufacture liable to customs duty which he had reason to believe had not been paid, and even of " unlawfully and corruptly *with force of arms* " permitting the goods to be bought by his sister. This last charge and a similarly worded one dealing with the alleged non-payment of customs duty was so absurd that Harriott can never have been in danger of conviction of them, but his acquittal on the others depended on his being able to show either that the goods had never been sold in the circumstances alleged, or what was more likely, that they had been sold at a proper price, their estimated value of £30 being much inflated.

The " tobacco " charges

The third member of his family to provide ammunition for his attackers was his second son Thomas, who in the summer of 1808 whilst employed by the East India Company, had arrived in the Thames on board the *Marchioness of Exeter* bringing with him a thousand East Indian cigars and a thousand cheroots. These he got some watermen employed by the Thames Police Office to take to his father's house, where he was to stay with his father whilst in England. Some he smoked himself, some no doubt Harriott enjoyed and others were consumed by the resident magistrate's visitors. One of the latter, invited by Thomas Harriott, was either Gullifer or Tomlins, who when he was hunting for possible charges against his host, remembered the pleasant smokes he had had and the circumstances in which the cigars and cheroots had come into the house, and got the Treasury Solicitor to frame six counts alleging in alternative ways that Harriott had employed surveyors and constables in a police boat to load and take to his house in Wapping a large quantity of tobacco the import of which he knew to be prohibited because it was, in one count, not the produce of Spanish or Portuguese plantations, and, in another, not grown in His Majesty's Dominions or the U.S.A. Perhaps with the idea of persuading the jury that Harriott had been engaged in dead-of-night smuggling, the seventeenth count declared that he had landed the tobacco " privately and clandestinely."

These last charges were so trumpery that it is surprising that the Treasury Solicitor yielded to the persuasions of the despicable creature who produced them. Harriott was never called upon to answer them, however, because as soon as the judge realised their trifling character he asked the Attorney-General, who was prosecuting, if he thought that they were not worth proceeding with, to which Sir Vicary Gibbs replied that he did and was glad that his Lordship had suggested it; they were thereupon withdrawn.

The dramatis personae

The judge was the Chief Justice himself, Lord Ellenborough, a stern figure with shaggy eyebrows and a commanding forehead who had a reputation for bullying juries into bringing in the verdict he thought desirable. His presence on the Bench may have been merely the chance of a rota or it may have been purposely arranged because, although the alleged offences were not very serious and no difficult legal points were likely to arise, the defendant, as a stipendiary magistrate, was in a responsible judicial post and the Government were anxious that the trial should be conducted in a way which would not give cause for criticism. If this was so, it would also explain why the Attorney-General himself undertook the prosecution which otherwise would have been quite within the competence of far less eminent counsel. It may be, of course, that Gibbs only made a brief appearance and then handed over the case to his junior, as "silks" sometimes do, but if he did conduct the case throughout it is not likely that he made as good an impression on the jury as Harriott's counsel, James Park. The Attorney-General was a thin little man, humourless and uninteresting, who was known in the courts as "Vinegar" Gibbs, whereas Park had acquired a considerable reputation by reason of his pleasant, earnest manner and clarity of thought and speech. The son of a Scottish doctor, but brought up in England, Park had made himself pre-eminent on the North-Eastern circuit and had only two rivals in London, where he had succeeded to much of the work of the judge before whom he was now appearing when that highly successful advocate, then William Law, became Attorney-General in 1802. Harriott probably chose him for his defence because Park, although a stranger to him, was well known in shipping circles as the author of a popular Treatise on the Law of Marine Insurance.

The evidence

In 1810 reports of court proceedings had not yet become a major feature of both national and local newspapers, and even cases which aroused much public interest might get little more than a belated paragraph. There was therefore no danger that Harriott would see his name in headlines and little likelihood that this trial would be mentioned, unless in a couple of sentences. This absence of publicity was fortunate for him but not for his biographer, who in the absence of any contemporary report, can only speculate as to what witnesses gave evidence and what they said, except for what can be gathered from Harriott's own short and incomplete account.

It is unlikely that Kinnard went into the box, but Tomlins and Gullifer did and, according to Harriott, writhed in agony as they were induced by clever cross-examination to reveal themselves as the mean, spiteful, untrustworthy creatures they undoubtedly were. Several surveyors and constables must have been called upon to describe what happened about the men from the *Lady Jane Dundas* and how the shawl and muslin were seized, and workmen from Harriott's ship pump factory, perhaps his partner Hurry also, may have given evidence about the work they had done for the Thames Police Office.

It is not likely that Unwin was a prosecution witness, as in his own interest he would deny the existence of any agreement alleged to be corrupt; moreover, there is some indication that he instructed counsel for the defence. And whilst it is possible that Hannah Harriott and her nephew George were subpoenaed by the prosecution it is much more probable that they were emphatic witnesses for the accused. We can be certain, at any rate, that Harriott himself did not go into the witness box, because that was a right no defendant to criminal charges had before 1872; for him there was the purgatory of listening to others talking freely about what he was supposed to have done whilst himself compelled to remain silent.

He sat through it all, nevertheless, from the preliminaries, when several jurymen who had been warned to attend failed to answer and others had hastily to be empanelled, to Park's final speech and the judge's summing up. Of the nature of the latter we know nothing although it can be deduced from the result that its trend was favourable to the accused. About the former we can be sure that it was in Park's best persuasive style, as Harriott wrote that he exerted himself " in a manner that convinced all present, that he *felt* for the injury sustained by his client, as though it had been his own case."

Verdict and sentence

Harriott was present, although the judge was not, when Peter Keates of Goswell Street, Charles Digby of Mare Street, Hackney and the other shopkeepers and business men on the jury returned to give their verdict. His heart sank when he heard the foreman answer the clerk's question on the first three counts, relating to the billheads, that they found him guilty of the fact that he had withheld his name, but it rose again when " by the acclamation of three or more of them," as he put it, it was added that he had done so without any corrupt motive. When on the remaining nineteen counts the jury returned an unequivocal verdict of " Not Guilty " the great weight of anxiety which had lain upon him for so many months was lifted and he rejoiced that his greatest struggle had come to a satisfactory end. Alas, he rejoiced too soon; the malignancy of Fate was not yet expended.

The gravamen of the charges about withholding his name was that he had done so corruptly; that is, in order to obtain a benefit to which he knew that he was not entitled. Harriott was so sure that the absence of a corrupt motive was plain from the facts that he left them to speak for themselves and went to no trouble to prepare a defence. The jury's verdict, if his account of the way it was delivered is correct, shows that they agreed with him, but unfortunately the clerk wrote down " Guilty " and although, according to Harriott, " affidavits the most respectable were afterwards delivered in " to prove " the qualifying addition, which acquitted [him] of the criminality " the record had to stand as it was written. Lord Ellenborough returned and on the three counts ordered Harriott to pay a fine of £100 within three weeks or to be imprisoned until it was paid.

A dreadful blow

Harriott returned to the house where he had been staying pending the trial in great despondency.

Minor though the counts were on which he had been convicted, and exonerated as he was by the jury's verdict from the allegations against him of fraud and corruption, the Home Secretary might nevertheless decide that he had sufficient cause to remove the Resident Magistrate from the Bench. That would be a financial disaster from which, with legal costs and the fine to pay, he might never recover. Worse still, it would take him away from his beloved Marine Institution, his major preoccupation for over a decade, and leave him a disorientated and despairing man, too old at sixty-five to start again.

The weekend which followed was the most anxious he had ever known, and on Monday he received a letter from the Secretary of State which justified his fears. It suspended him from duty whilst his case was considered; for an indefinite time he was to be without income or occupation or certainty as to his future. This was the culminating blow; after all that he had undergone the prospect was too much for him. His nerves gave way and he succumbed to a raging fever. His illness lasted a long while and brought him near to death. He was still far from well when another letter arrived from the Secretary of State.

Vindication

Dated July 7, 1810, it was the best letter Harriott had ever read. It said " I have received the King's Command to acquaint you that the suspension from your duty as a Magistrate at the Thames Police Office notified to you in my letter of the 18th ultimo is taken off and I have the satisfaction to inform you that you are again to resume the duties of that station."

He was weak and worn, but now he had permission to return he could not stay away from the Thames Office a moment longer. Somehow or other he got himself to Wapping and on July 9 for the first time for nearly a month a letter went out from the magistrates with his name in its rightful place at the head of the signatures.

It was a long while, however, before his health was fully restored and he was not able to take his normal vigorous part in the activities of the Thames Police until well into the autumn.

It took him a long while, also, to recover from the financial loss he had incurred through his trial—the fine of £100, nearly three weeks without salary, and legal costs exceeding £200.

Postscript

He had one pleasing mitigation of this financial hardship. Shortly after his trial his leading counsel, James Park, sent for young George Harriott, who was still apparently in the service of John Wright Unwin, and gave him a banker's draft for the fees which Harriott had paid him. George, knowing his father's independent spirit, protested that this was too great a generosity but Park insisted. When George delivered the message and the draft Harriott's first reaction was to decline " so unexpected a kindness " but, he said later, " the next instant I became fully sensible of the genuine meaning and goodness of the heart, which administered such an healing cordial to my bosom ;—that *he* who (as my counsel) must necessarily know every point of my case, both for and against me, should be so well satisfied with the whole tenor of my conduct, as to make a compliment of his very great exertions in the cause of injured innocence."

He at once sent his earnest thanks to Park, who replied " I am very glad you received what I took the liberty of sending by your son. I had two motives, as applicable to yourself ; one was to alleviate, as far as lay in my power, the weight of that burden, which had fallen upon you ; the other was, to testify to you the deep sense I had of your uncorrupt conduct as a magistrate and the infamy of the charges brought against you."

That letter is a splendid tribute to the character of a very able counsel and the best possible evidence of Harriott's integrity.

Larceny and the Owner's Consent

By PETER ARCHER
Barrister-at-Law

Peoples nurtured under the common law entertain a healthy suspicion of the *agent provocateur*. But waiting to catch a wrongdoer in the act is only common sense. And the difference between the two situations has given rise to some fine distinctions.

Gaius offered an answer the logic of which has never subsequently been challenged (though Justinian's compilers overruled him on admittedly pragmatic grounds). " . . . if Titius solicits my slave to steal my property, and convey it to him, and my slave informs me of it, and I, wishing to detect Titius in the act, permit my slave to carry my goods to him; it has been questioned whether . . . an action for theft . . . can be maintained. . . ." He answers in the negative " because his dealing with my property is not an act done against my will. . . ." [1]

Early English cases

The question arose in English law in 1801. A factory watchman was invited by thieves to assist in stealing from the premises. He disclosed the plan to his employer, and on the employer's instructions arranged to open the gate for them and permit them to remove the property from the counting house out to the factory yard, where they were apprehended. It was held that they had committed larceny.[2]

The reasons given in the majority judgment were that the employer had only facilitated a plan already concocted and that " this could no more be considered an assent than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts. . . . Bolton never meant that the prisoners should take away his property." This appears startling, since clearly he did intend that it should be taken from the counting house to the yard, and this was the very asportation on which the charge of larceny was founded.

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[1] 3. 198.

[2] *R.* v. *Egginton*, 2 Leach 913.

The argument turned largely upon a different distinction; that between actually inducing the offence, by suggesting it to the thieves, and merely facilitating a plan already contrived by them. Counsel contrasted *R.* v. *Macdaniel*[3] with *Norden's Case.*[4] In the latter case, one Norden, in order to catch a certain highwayman, arrived at the spot where he had heard the man would be, handed over his money when it was demanded, and then produced a pistol and arrested the man. The highwayman was held guilty of robbery. In *R.* v. *Macdaniel* one Salmon, in order to claim a reward, arranged that his agent should suggest to two men that they should rob him (Salmon). The agent brought them to where Salmon was waiting, and they took his property. The court held that he had consented to part with it, and that therefore there was no robbery.

Foster distinguished the cases on the ground that, in *R.* v. *Macdaniel,* the victim had himself suggested the offence. And in *R.* v. *Egginton,* much was made of the fact that, the employer not having made the original suggestion, the case fell on the *Norden* side of the line.

R. v. *Egginton* was followed in *R.* v. *Williams*[5] and in *R.* v. *Simmons.*[6] In the former case, the servant of a publican, on his employer's instructions, placed some coins on the counter, so that the prisoner could, by previous arrangement, take them up. In *R.* v. *Simmons,* the original submissions were based on the understanding that the property was handed over, on instructions, by the victim's servant. But he was recalled, and made it clear that he had placed the articles on the counter, whence the prisoner had taken them up. The recorder observed: "That brings the case precisely within *R.* v. *Williams*; but if the prisoner had received them from the hand of (the servant), I should certainly have held it a felonious taking as the *animus furandi* clearly existed at the time."

In *R.* v. *Lawrence*[7] the situation envisaged in the *obiter dictum* arose. The prosecutor's servant, acting upon his instructions, handed the property to the prisoner. It was held, contrary to the dictum, that there was no larceny. The test was not the prisoner's state of mind, for that "proves the animus not the taking." The recorder added: ". . . the owner did not deliver the goods or consent to be robbed; but he consented that the prisoner should be permitted to rob him." This latter distinction is so narrow as to be virtually meaningless.

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[3] (1755) Foster 121.

[4] Probably 1754, referred to by Foster at 128.

[5] (1843) 1 Car. & Kir. 195.

[6] (1848) 13 J.P. 90.

[7] (1850) 14 J.P. 561.

The law as established in the cases

The authorities now established four propositions:

(1) Once animus is proved, the state of mind of the wrongdoer is not relevant to Gaius' problem.

(2) If the owner of the goods originally suggested the enterprise, in order to trap the prisoner, there is no larceny.

(3) Even where the original plan came from the prisoner, there is no larceny if the goods are actually handed to him on the owner's instructions.

(4) If the prisoner, having concocted the plan himself, is merely permitted to take the goods, he commits larceny.

A reason for proposition (2) is suggested by Professor J. J. Cremona.[8] If there were larceny in this situation, he argues, the owner would be an accessory to the theft of his own goods, and this is impossible because he would be consenting to the taking. This disposes of the true *agent provocateur*, and it is a matter of consent.

But it is frequently suggested (*e.g.*, *Archbold*, 34th ed., § 1510; *Corpus Juris Secundum*, Vol. 52, p. 816) that the distinction between propositions (3) and (4) is that in the former case the taking is not "without the consent of the owner," while in the latter case, it is. It is submitted that this is a false distinction. If intending the goods to be removed is equivalent to consent, there is consent in both cases. But if consent requires an expressed permission, then that element is not present in either. However, there is to hand a happier distinction, for in the former case there is, while in the latter case there is not, an asportation.

Similarly, in breaking and entering, the offence is committed if the door is opened by the prisoner with a key provided on the owner's instructions,[9] but not if it is opened for him by the owner's servant.[10] And the distinction rests upon whether there is a breaking, and not whether there is an invitation.

R. v. Turvey

In *R.* v. *Turvey*[11] there arose an opportunity to distinguish between the "consent" and the "asportation" tests. The appellant suggested to the manager of a goods depot that he should take goods from the depot and deliver them to him. The manager disclosed the plan to his superiors and, on their instructions, handed the goods to the appellant. It was held that there was no larceny.

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[8] *The Doctrine of Entrapment in Theft*, Progress Press, Valetta, Malta, 1959.

[9] *R.* v. *Chandler* [1913] 1 K.B. 125.

[10] *R.* v. *Johnson* (1841) Car. & M. 218.

[11] [1946] 2 All E.R. 60; 31 Cr.App.R. 154.

But both the judgment and the Editorial Note in the *All England Reports* speak of the " consent " and " asportation " tests as though they were the same test. Lord Goddard C.J. said that there was " no evidence here of what, to use a technical expression, is termed asportation. He did not carry away the goods against the will of the owner. . . ." The use of the term " asportation " is criticised in *Russell*. " In *R*. v. *Turvey*, the use of the word ' asportavit ' (*sic*) to indicate the absence of the owner's consent, would seem to have been made *per incuriam*."[12] A similar objection is made by Professor Cremona, *op. cit*.

Although the words quoted above lend themselves to this criticism, the term " asportation " was used correctly. The case did not turn on consent (which was present or absent to precisely the same degree as in *R*. v. *Egginton*). The appellant did not commit larceny because there was no asportation. And we are spared ascribing to the owner a fictitious consent which, in other situations, we may have cause to regret.

The Vehicles (Excise) Act, 1949 Authority to Prosecute

By KEITH C. CLARKE,

Assistant Prosecuting Solicitor, Essex County Council

It has been felt that since the coming into force of the Finance Act, 1956, there is some doubt as to whether a local government officer requires specific authority from his council to institute proceedings for a prosecution under section 13 or section 15 (1) (using vehicles without a licence or proper licence) of the Vehicles (Excise) Act, 1949, or whether a general authority to institute such proceedings will be sufficient. In other words, will it suffice if the council, or a committee to which the council's powers in this respect have been fully delegated, pass a resolution on the lines that the town clerk may institute proceedings on behalf of the council in all cases where he is satisfied that there is prima facie evidence of an offence against section 13 or section 15 (1) of the Act of 1949, or is it necessary to have each prosecution separately authorised by reference to the name of the alleged offender? This question is of considerable importance to those entrusted with the task of enforcing this part of our criminal law and also those who are called upon to defend revenue cases. It is therefore proposed to examine the question together with some other matters which are closely related to it and it will be convenient to deal with the relevant points under the following headings:

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[12] 11th ed., p. 1028.

(1) The decision in Jones v. Wilson [1]

In this case the respondent, who was the chief constable for the county borough of Merthyr Tydfil, laid an information against Mr. Jones for keeping a male servant without a licence and the case was originally heard by the stipendiary magistrate in December, 1917. The relevant statutes were:—

- (a) The Inland Revenue Regulation Act, 1890, s. 21 (1): "It shall not be lawful to commence proceedings against any person for the recovery of any fine, penalty, or forfeiture under any Act relating to inland revenue . . . except by order of the Commissioners and in the name of an officer, or in England in the name of the Attorney-General for England . . .";
- (b) The Finance Act, 1908, s. 6, the effect of which was to transfer to county and county borough councils the powers of the Inland Revenue Commissioners to levy duties on local taxation licences; and
- (c) An Order in Council of October 19, 1908, which fixed the date of the above-mentioned transfer. Article 9 of the Order made this provision: "Every county council [2] may delegate to such of their officers as they may select any of the powers and duties now exercised or performed by officers of Inland Revenue, and any officer so selected shall be subject to the same liabilities as an officer of Inland Revenue."

At the hearing before the magistrate Mr. Jones had raised a preliminary objection to the validity of the information on the ground that no order of the borough council or of its watch committee authorising the particular proceedings against him had been obtained by the chief constable. The chief constable had relied upon the fact that, pursuant to the Finance Act, 1908, and the above-mentioned Order in Council, the council of the county borough had in December, 1908, resolved that the powers and duties then exercised by officers of the Inland Revenue be delegated to the town clerk, borough controller and chief constable respectively. They had also resolved that all matters relating to local taxation licences be dealt with by the watch committee. The respondent had maintained that the terms of the council's resolution gave him a general authority which was sufficient to institute proceedings in all such cases and that specific authority for individual cases was unnecessary. The magistrate decided this point in favour of the chief constable and convicted Mr. Jones who appealed to the King's Bench Division of the High Court on the point of law. The High Court said that the magistrate had been wrong and held that, under the statutes mentioned, no officer of a local authority[3] could take proceedings for the recovery of a fine under any Act relating to Inland Revenue without an order from the local authority to take proceedings in the particular case. A general direction to take proceedings in such cases was insufficient. The reasons for this judgment become crystalline in the following words of Avory J.: " . . . the magistrate held as a matter of law that the respondent, as chief constable, had power and authority to take proceedings for the recovery of the penalty without any order of the borough council or the watch committee because there had been delegated to him the powers and duties of an officer of Inland Revenue. It is clear from section 21 (1) of the Inland Revenue Regulation Act, 1890, that an officer of Inland Revenue had no power in himself to take any such proceedings without an order of the commissioners. Therefore, an officer of Inland Revenue could not himself have taken these proceedings without an order of the commissioners. Consequently, no person to whom the powers of an officer of Inland Revenue had been delegated could take any such proceedings by virtue merely of such delegation."[4] He went on to point out that the transfer provisions (*i.e.*, the Finance Act, 1908, and the Order in Council) did not confer upon the local authority any greater power than that which the Commissioners previously had. It therefore appears that after the transfer provisions the relationship between Commissioners and Inland Revenue officer was replaced by that of local council and officer, and that the latter relationship could only be defined by reference to the statutory provisions governing the former. This being the case, an " order " of the local council was now necessary before proceedings could be commenced by an officer and an " order " meant an express order with regard to the particular prosecution.

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[1] (1918) 82 J.P. 277; [1918] 2 K.B. 36; 87 L.J.K.B. 1040; 119 L.T. 45; 62 S.J. 653; 16 L.G.R. 614; 26 Cox C.C. 265.

[2] This expression included county borough councils—Article 17.

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[3] It will be recalled that the present case was decided many years before *Fisher* v. *Oldham Corporation* [1930] 2 K.B. 364; 94 J.P. 132.

[4] 82 J.P. at p. 278.

A fairly close examination of this case has been considered necessary because we shall shortly be concerned with the precise limits of its application.

(2) The nature of an authority to prosecute and the method of deciding whether one is necessary or sufficient

The local government officer who is employed to enforce various parts of the criminal law will invariably be the subject of a resolution of his council under section 277 of the Local Government Act, 1933. This section enables local authorities to pass a resolution authorising any member or officer of the authority "*either generally or in respect of any particular matter,* to institute or defend on their behalf proceedings before any court of summary jurisdiction . . . and any member or officer so authorised shall be entitled to institute or defend any such proceedings . . ." The writer takes this section to mean that an official may, by the terms of his council's resolution, possess either the authority to lay informations in all cases of a specified class according to whether in his view the evidence justifies it or, alternatively, the authority only to institute proceedings in specific cases approved by the council.[5] However, in deciding whether an official who institutes proceedings on behalf of his council has the proper and necessary authority one is bound to base one's decision upon the precise wording of the statute which deals with the right to prosecute the offence in question. It is this statute which will determine the matter, and the fact that an officer is empowered by his council to prosecute by a resolution properly made under section 277 of the Local Government Act, 1933, will only be relevant to the extent of deciding whether the terms of that resolution satisfy any requirements in the penal statute. In this connection three points are worthy of note, *viz.*:

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[5] At 116 J.P.N. 38 the view is advanced that s. 277 of the 1933 Act does not enable a local authority to purport to give to its officer the power of deciding which matters should be prosecuted. However, this view is modified at 116 J.P.N. 183 in the light of the decision of the Divisional Court in *James* v. *Stein* (1946) 110 J.P. 279. In this case an inspector of weights and measures had a general authority from his council to institute proceedings under the Food and Drugs Act, 1938, and it was held that this authority included the power to decide whether or not it was proper to prosecute the manufacturer or wholesaler under s. 83 (3) of that Act. Lord Goddard C.J. said: "We must give a reasonable and sensible meaning to s. 277 of the Local Government Act, 1933, and to the authority which, pursuant to that section, the county council conferred on the appellant. If we came to any other decision it would mean that nobody could be prosecuted by the appellant for any offence under this Act, so far as I can understand it, except where he had got the specific authority of the county council in each case to prosecute."

(a) Some statutes do not place any limit upon the right to prosecute and if this is the case any member of the public may institute proceedings. The local government officer and constable would then be in the same position as any other member of the public and the former could institute proceedings without any authorisation from his council upon the principle that any person may prosecute under a penal statute unless it contains some limitation in this respect.[6] In practice, however, the officer would ensure that he was armed with a resolution giving at least general authority to prosecute in such a case because he might otherwise find himself personally responsible for costs incurred by the proceedings, except to the extent that they were ordered to be paid by the defendant.

(b) Numerous statutes do place a limit upon the right to prosecute and in such cases the question of whether a general authority will suffice, or whether a specific authority for the particular case is necessary, will depend entirely upon the way in which this limitation is framed. We have already seen that it was upon the precise wording of the statute limiting the right to prosecute that the High Court decided in *Jones* v. *Wilson, supra,* that what purported to be a general authority was insufficient in that particular case. However, we shall shortly see that a statute may be so worded as to indicate that a general authority is sufficient.

(c) It is the duty of a magistrate when issuing process, or his clerk, to satisfy himself that any necessary consent or authority has been obtained.[7]

(3) The Vehicles (Excise) Act, 1949, and Jones v. Wilson

Before 1956 the question of who could prosecute offences under this Act had to be determined by reference to a number of statutory provisions. The first of these provisions was section 281 of the Customs and Excise Act, 1952, which replaced a good many repealed measures including section 21 (1) of the Inland Revenue Regulation Act, 1890. It will be recalled that this last-mentioned subsection formed the basis of the decision in *Jones* v. *Wilson*. Section 281 (1) of the 1952 Act made this provision: " No proceedings for an offence under the customs or excise Acts . . . shall be instituted except by order of the Commissioners." Subsection (2) of the same section said: " Any proceedings under the said Acts instituted in a court of summary jurisdiction . . . shall be commenced in the name of an officer." It will be seen that this section deals with the institution of proceedings for revenue offences in precisely the same terms as did section 21 (1) of the old Inland Revenue Regulation Act of 1890. The application of this section to prosecutions under the Vehicles (Excise) Act, 1949, was made clear by section 307 of the Act of 1952, which provided that the expression " excise Acts " meant the provisions of any Act for the time being in force relating to excise, and section 8 (2) of the Act of 1949, which transferred to local authorities and their officers all the powers of the Commissioners of Customs and Excise and their officers in relation to vehicle licences. These last-mentioned powers included not only the levying and collection of duties but also the enforcement of the law relating to those duties under the Act of 1949.[8] It will therefore be observed that before 1956, a local government officer prosecuting offences under the 1949 Act upon the authority of his council was in exactly the same position as was the informant in *Jones* v. *Wilson*, *i.e.*, he was, in view of certain transfer provisions, placed in relation to his council as was an officer placed in relation to the Commissioners, and under the enactment dealing with the last-mentioned relationship the officer required an " order of the Commissioners " to commence proceedings. It was thus felt before 1956, with every justification, that *Jones* v. *Wilson* applied to the local government officer who laid an information for an offence under the Vehicles (Excise) Act, 1949, and that such an officer required specific authority to prosecute in each case.

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[6] " Prima facie there is no doubt that anybody may take proceedings to recover a penalty. That is an old rule and is well established. In order to prevent the application of the general rule it must be shown that the Act in plain terms prevents anyone, except certain specified persons, from prosecuting for offences under the Act." *per* Kay L.J. in *R.* v. *Stewart* [1896] 1 Q.B. 300; 60 J.P. 356.

[7] *Price* v. *Humphries* [1958] 2 Q.B. 353; [1958] 2 All E.R. 725; 122 J.P. 423.

It will also be noted that, in view of the above-mentioned provisions, it was fairly clear that police officers could not prosecute under the 1949 Act since all the offences created by it were excise offences and informations in respect of such offences could only be laid by local government officers or officers of Customs and Excise.[9]

(4) The Finance Act, 1956, s. 5 (5)

This subsection placed the institution of proceedings under the Vehicles (Excise) Act, 1949, on a completely new footing. Section

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[8] It will be noted here that the Act of 1949 had to be read as if it contained an anticipatory reference to the legislation of 1952 but, as we have seen, s. 281 of the 1952 Act merely re-enacted *inter alia* s. 21 (1) of the 1890 Act. This lead to some confusion in the past although both the 1952 and the 1949 Acts were in fact pure pieces of consolidation.

[9] There is an interesting letter from the Town Clerk of Grimsby relative to this at 120 J.P.N. 603.

281 of the Customs and Excise Act, 1952, was repealed in relation to offences under the 1949 Act (either as enacted or as applied by section 8 (2) of the 1949 Act) and replaced by the following provision: " . . . proceedings may be instituted by any local authority and, in the case of an offence under section thirteen or subsection (1) of section fifteen of that Act [*i.e., the Act of 1949*] (which relate to the use of vehicles without a licence or proper licence),—

> (*a*) No proceedings shall be instituted except by a local authority or by a constable with the consent of a local authority (which may be given on their behalf by a duly authorised officer of theirs and proved by the production of a document purporting to be the consent so given and to be signed by the officer giving it) ; . . . In this subsection " local authority " means the council of a county or county borough."

Thus, under the new provisions, proceedings generally under the Act " may " be instituted by a local authority and proceedings under sections 13 and 15 (1) can only be instituted by a local authority or a constable with the council's consent. One thing which, in the writer's submission, is clear from this change in the law is that *Jones* v. *Wilson* can no longer be regarded as an authority for saying that prosecutions instituted by a person on behalf of a local authority under any part of the 1949 Act require specific authorisation, because that decision was founded strictly upon certain words which no longer appear in the enactment now governing the right to prosecute under this Act.[10] We have already seen that in deciding whether an authority to prosecute is sufficient the governing factor is the wording employed in the statute which deals with that right. We are therefore obliged to consider the matter afresh and, in doing this, cases decided upon other statutory wording will only be of assistance in so far as the wording employed coincides with the wording of section 5 (5) of the 1956 Act.

(5) The prosecution of offences under the Vehicles (Excise) Act, 1949, other than those under sections 13 and 15 (1)

There is now no limitation upon the right to prosecute under these parts of the Act. The position therefore is that any private individual, be he a local government officer or a police officer, may lay an information. The only difficulty which might arise in the case of a local government officer instituting proceedings without some authority from his council would be as to costs, which could not in those circumstances be awarded against the local authority. In *Snodgrass* v. *Topping*[11] a chief sanitary inspector laid an information under section 3 of the Food and Drugs Act, 1938, and the magistrates dismissed the case on the ground that the inspector had no authority from his council to prosecute. The High Court held that the magistrates were wrong because the statute contained no limitation upon the common law right of any person, whether a person aggrieved or not, to take proceedings in respect of an offence. The relevance of this case lies in the fact that under the statute the court were considering (*i.e.*, the Food and Drugs Act, 1938) the position was that the council could prosecute, but there was nothing to say that they alone could do so. This is so under the parts of the 1949 Act which we are now considering and therefore the same ruling as to the position of the local government officer must apply. If the officer acting without authority from his council laid an information under these parts of the Act purporting to be " on behalf of the borough council " it seems that these words in the information could be rejected as mere surplusage.[12]

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[10] Mr. G. S. Wilkinson appears to hold the view that *Jones* v. *Wilson* is still an authority applicable to prosecutions under ss. 13 and 15 (1) of the Act (*Road Traffic Offences*, 3rd ed., p. 183) and the editors of the *Justice of the Peace and Local Government Review* seem to consider that this case is an authority for saying that a constable who prosecutes offences under these sections must have specific authority from the council (123 J.P.N. 31, 341). However, the learned editors of *Stone* have omitted any reference to this case in the Justices' Manual since 1956.

(6) The prosecution of offences under sections 13 and 15 (1) of the Vehicles (Excise) Act, 1949

Prosecutions under these sections are limited so that no proceedings may be instituted except by a local authority or by a constable with the consent of a local authority. There is an administrative provision that the consent mentioned *may* be given on the authority's behalf by an authorised officer of theirs and proved by the production of a document purporting to be the consent so given and signed by the officer.

(a) *Prosecutions by constables*

It seems that specific mention was made of the constable because under the old provisions which we have discussed he could not lay an information. It is now intended that he should be able to do this, provided that he obtains the consent of the local authority. Does this provision mean that he must have a separate consent for each case or will a general consent suffice? Similar wording was employed in the Weights and Measures Act, 1904, s. 14 which said that a weights and measures inspector "may, with the consent of the local authority, prosecute . . . any information . . . arising under the Weights and Measures Acts . . . ." In 1905 the High Court decided that, upon this particular wording, a separate consent from the authority to prosecute each case was unnecessary and that a general consent given to a named inspector was sufficient.[13] Counsel argued that since the Act dealt with offences which could be committed inadvertently it was most important that the question of whether proceedings ought to be taken should in each case be considered by the authority itself and not left to the official. Apparently the court were not impressed by this argument. Lord Alverstone C.J. said: "If it had intended that a separate consent was to be given in each case, I should have expected to find in the Act a very much clearer expression of that intention." [14]

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[11] (1952) 116 J.P. 332.

[12] *Giebler* v. *Manning* [1906] 1 K.B. 709; 70 J.P. 181.

The only difference between the wording employed by the statute in *Tyler* v. *Ferris*, *supra*, and the wording employed by that part of section 5 (5) of the 1956 Act now under consideration is that, in the first case, the right to prosecute was expressed in positive form (*i.e.*, may, with the consent of the authority) whereas, in the second case, the form of expression is negative (*i.e.*, no proceedings except with the consent of the authority). It appears to the writer, however, that the important question is not whether the right to prosecute is expressed in positive or negative form, but rather the precise meaning which one is to attach to the word which gives the only clue to what the person laying the information requires from the authority (*i.e.*, in these cases "consent"). The decision in *Tyler* v. *Ferris*, *supra*, turned entirely upon the significance which the court attributed to this very word. An example of an expression in negative form employing slightly different wording can be found in the case of *Westminster Coaching Services, Ltd.* v. *Piddlesden*.[15] Here the High Court were considering *inter alia* the wording of section 95 of the Road Traffic Act, 1930, which limited the right to take proceedings for certain offences under Part IV of that Act in these words: "Proceedings . . . shall not . . . be instituted except by . . . a person authorised in that behalf by . . . a chief officer of police. . . ." The information in question had been signed by a superintendent and an assistant commissioner of police and these gentlemen had a letter of general authorisation to institute proceedings from the commissioner himself. It was held that this general authorisation was sufficient and, in distinguishing the case from *Jones* v. *Wilson*, Avory J. said: "That case was decided on the ground that there was no evidence that the proceedings were instituted by order of the county borough council to whom the powers of the Commissioners had by that date been transferred. There is, in my opinion, all the difference in the world between saying proceedings are not to be instituted except by order of so-and-so and saying that proceedings are only to be instituted on behalf of a particular person."[16] The courts are apparently prepared to take a fairly broad view of the nature of the authority required by a person who must be "authorised" to take proceedings on behalf of another. What is interesting is that it is quite clear from the judgment of Lord Alverstone in *Tyler* v. *Ferris*, *supra*, that he was unable to draw any significant distinction between those statutes allowing public bodies to "authorise" their officials to take proceedings and the statute which allowed proceedings to be taken "with the consent of the local authority." He was clearly of the view that in either instance a general authority would suffice. Thus, we have so far considered three types of statutory wording dealing with the right of officials to institute proceedings:

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[13] *Tyler* v. *Ferris* [1906] 1 K.B. 94; 70 J.P. 88. The point never seems to have been taken in this case that, upon the wording of the statute, there was no restriction on the inspector's common law right to prosecute as an individual.

[14] [1906] 1 K.B. at p. 97.

[15] (1933) 97 J.P. 185; 149 L.T. 449.

(i) "Proceedings not to be instituted except by a person authorised."
(ii) "May, with the consent" and "no proceedings except with the consent."
(iii) "No proceedings except by order."

The restrictions placed upon the official by the wording employed in (iii), *supra*, would certainly, on the face of it, appear to be tighter than those in (i) and (ii), *supra*. In any event it is submitted that, upon such authorities as are relevant to the issue, where the wording at (iii) is employed specific authority must be produced for the institution of each prosecution. However, it seems that where the wording at (i) or (ii) is employed there is good ground for arguing that a general authority is sufficient and this, of course, applies to the consent given by a local authority to a constable under section 5 (5) of the 1956 Act.

(b) *Prosecutions by officials.*

Finally, we must now consider the first part of the limitation in section 5 (5), namely, that no proceedings shall be instituted except by a local authority. Similar wording is to be found in section 298 of the Public Health Act, 1936, where it is provided *inter alia* that: "Proceedings . . . shall not . . . be taken by any person other than . . . a council. . . ." However, there does not appear to be any decided case upon the question of whether a general authority given to a local government officer by his council would be sufficient to enable him to properly lay any informations when this type of restriction is to be found in a statute. In the absence of any such case law it is rather difficult to say whether a general authority would suffice. Briefly, the following points could be advanced against the validity of a general authority:

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[16] 97 J.P. at p. 191.

(i) It could be argued, with reference to the statutory wording, that to say proceedings shall only be instituted " by a local authority " is a more stringent restriction than to say that they shall only be instituted " by order of a local authority " (the *Jones* v. *Wilson* type of restriction) and that in the former case the discretion as to whether or not to prosecute can only be exercised by the authority itself and not its officials.[17]

(ii) The general argument against such authorities, namely, that it is dangerous to entrust mere officials of public bodies with power to decide whether, and against whom, to institute proceedings. Those who advance this argument point to the way this danger has materialised in the United States.[17]

On the other hand, the following may be said in favour of the giving of a general authority:

(i) One might reasonably assume that Parliament did not intend by section 5 (5) to place the constable and the local government officer in different positions with regard to the laying of informations. If, therefore, it is correct to say that a constable may act upon a general authority under this subsection, one is rather driven to the conclusion that a local government official must be in precisely the same position.

(ii) The subsection merely says that proceedings shall not be taken except by a local authority. A local authority is empowered by section 277 of the Local Government Act, 1933, to give to one of its officials a general authority to institute proceedings. In these circumstances one might say that if Parliament had intended that a separate authority was to be given in each case one would have expected to find a much clearer expression of that intention in the Act.

(iii) That the giving of a general authority to officials is not necessarily an undesirable thing. Some would say that an official with integrity, who is perfectly capable of deciding whether evidence justifies proceedings for certain specified offences which are within the province of his duties, is less open to outside influence and pressure than a member of a public body elected to his position by the community.

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[17] See generally an article entitled " More About the Power to Prosecute " at 116 J.P.N. 355.

(7) Conclusions

There is a good case for arguing that a general authority to institute proceedings under sections 13 and 15 (1) of the Vehicles (Excise) Act, 1949, given by a local authority to an official or a constable is sufficient. However, the matter is not free from doubt and until there is some authoritative decision upon the question it will be unwise to rely upon a general authority. The writer expresses the hope that this article has at least indicated the need for some inquiry at national level into the entire question of authorities to prosecute with a view to removing many doubts which exist upon this topic and possibly introducing some legislative measure which would co-ordinate existing provisions.

Case and Comment *

ARREST

Arrest without warrant—detention in police cell from 1 a.m. to 9 a.m.—Magistrates' Courts Act, 1952, s. 38.

R. v. Morgan

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Salmon JJ.: June 14, 1961: *The Times*, June 15, 1961.[1]

The court, dismissing M.'s appeal against his conviction for driving while under the influence of drink, said that it had been brought to their attention that the appellant had been kept in the police cells on the night of the offence from about 1 a.m. to 9 a.m. without being charged. There might be occasions when this treatment would be appropriate, but in the present case the appellant lived locally and there was no suggestion that he was unable to get home on that night. It had been said that this was the usual practice in the town in question when a person was arrested late at night. If that was the case it was a practice of which this court thoroughly disapproved. [H. P.]

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: *W. L. Mars-Jones* Q.C., *John Perrett* (instructed by J. F. Morris, Son & Lloyd).

Commentary. At common law it was the duty of one—whether a constable or a private person—who made an arrest without a warrant to take the arrested person before a justice, not necessarily forthwith, but as soon as reasonably possible: *John Lewis & Co. Ltd.* v. *Tims* [1952] A.C. 676. Since the Summary Jurisdiction Act, 1879, which gave a superintendent or inspector of police power to grant bail, the duty may be fulfilled by taking the arrested person before such a police officer. See now Magistrates' Courts Act, 1952, section 38. If a person were so drunk as not to be able to understand what was going on that would clearly be a good reason for not formally charging him.

EVIDENCE

Criminal Evidence Act, 1898, s. 1 (f) (iii)—*cross-examination as to character of co-prisoner—later admission by co-prisoner.*

R. v. Ellis

Court of Criminal Appeal: Ashworth, Salmon and Elwes JJ.: June 12, 1961: *The Times*, June 13, 1961.[2]

E. was convicted at the Central Criminal Court of breaking and entering and stealing and of receiving. One G. was also tried on the same indictment. The evidence for the prosecution included evidence that E. and G. were seen together removing articles from a warehouse and loading them on a van. E., giving evidence on his own behalf, said that G. had told him that he had bought some bankrupt stock and had asked him (E.) to help move it. G.'s counsel then applied for permission to cross-examine E. on his criminal record on the basis that E. had given evidence against a co-prisoner charged with the same offence, in accordance with the provisions of section 1 (*f*) (iii) of the Criminal Evidence Act, 1898. The trial judge ruled that such cross-examination was permissible. Later, G. changed his plea to one of guilty on the receiving charge but, as the prosecution were unwilling to drop the other charge, the trial proceeded. When G. gave evidence, he admitted that he might have told E. that he had acquired some bankrupt stock. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that at the time when E. was cross-examined as to character, G.'s defence was that he was not present for more than a moment and that he had been asked to hire the van for E. In those circumstances the evidence given by E. was properly held by the judge to be evidence against a person charged with the same offence within the meaning of section 1 (*f*) (iii) of the Act of 1898. Where the facts brought the matter within the relevant statutory exception, cross-examination as to character was a matter of right and not of discretion. However, the abandonment of G.'s defence had had the unfortunate result that the jury had been made aware of E.'s record when, as subsequent events showed, it was unnecessary. The question arose whether the trial should have been allowed to proceed before that jury. In the opinion of this court, it was not incumbent upon the judge to stop the case and order a retrial before another jury, although if an application had been made by E.'s counsel it should have been upheld. The omission to make such an application was understandable; but the fact that the trial proceeded when it might have been stopped did not afford a ground on which the verdict could be set aside. Since no ground had been put forward which called for interference with the verdict, the appeal would be dismissed. [H. P.]

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[2] For the appellant: *P. B. Pollock* (instructed by the Registrar, Court of Criminal Appeal). For he Crown: *Brian L. Leary* (instructed by the Solicitor, Metropolitan Police).

Commentary. The words "same offence" in section 1 (*f*) (iii) have been strictly interpreted. It is not enough that two accused are charged with offences arising out of precisely the same transaction unless they are charged with the same technical offence. So where A. was charged with false pretences in procuring money to be paid to B, and B was jointly charged with fraudulent conversion of the same money, it was held that B could give evidence against A with impunity: *R.* v. *Roberts* [1936] 1 All E.R. 23. In the present case, E. and G. were charged with the same offence throughout, since the breaking and entering charge continued against both throughout the trial. But when G. admitted the facts as to which E. had testified, E.'s testimony ceased to be relevant evidence against G.

When the prisoner is liable to cross-examination as to character under section 1 (*f*) (i) or (ii) of the Act, it is clear that the judge has a discretion to exclude such cross-examination. See *Harris* v. *D. P. P.* [1952] A.C. 694, 707; N*oor Mohammed* v. *R.* [1949] A.C. 182, 192 and *R.* v. *Cook* (1959) 43 Cr.App.R. 138; [1959] Crim.L.R. 358. It was established by *R.* v. *Rothery* [1958] Crim.L.R. 618 that this discretion does not extend to section 1 (*f*) (iii). This is logical for, in this case, the exclusion of the cross-examination would operate unfairly against the co-prisoner. Whether the judge has no discretion where it is the prosecution and not the co-prisoner who seek to cross-examine under section 1 (*f*) (iii) does not seem to have been settled. It is submitted that in principle the judge ought to retain his discretion in such a case, if it ever arises—which perhaps is not likely: *Cf.* Glanville Williams, *The Proof of Guilt* (2nd ed.) 191.

Food and Drugs (Scotland) Act, 1956, s. 6 (1)—secondary evidence

McLeod v. Woodmuir Miners' Welfare Society Social Club

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Sorn: 1960 S.L.T. 349.[3]

At their trial for selling spirits which did not conform to the description on the label exposed on the bottle, the defence solicitor's objection to the evidence of the sampling officer as to what was printed on the label on the ground that it was secondary and inadmissible was upheld. On the prosecutor's appeal by stated case against acquittal.

Held, that as the Act gave no power to impound the bottle and label the secondary evidence was admissible and conviction substituted.

Commentary. In general, primary evidence is preferred to secondary, Dickson, *Law of Evidence* (3rd ed.), I, 203; and it is proper to produce where practicable any article referred to in the indictment: *Maciver* v. *Mackenzie*, 1942 J.C. 51. Since the 1956 Act confers no power to impound the bottle and label and since in any event it is not known until the analysis whether the sample and therefore the contents of the bottle are deficient, it is not practicable to secure the bottle as a production. The present case is therefore one where secondary evidence is admissible and the inference seems to have been accepted, surprising perhaps in a Scottish court, that purchase of the whole bottle is impracticable.

The English rule that a written document must be produced unless physically impossible or highly inconvenient (Halsbury's *Laws of England*, 3rd ed., Vol. 10, 851) might lead to the same result; *cf. R.* v. *Collins* [1960] Crim.L.R. 490. An extreme illustration was *R.* v. *Edge* (*Wills on Circumstantial Evidence*, 7th ed., 319) where evidence of the inscription on the name-plate of an exhumed coffin was rejected as the plate was detachable.

For a case under the corresponding English statute, see *Nottinghamshire County Council* v. *Emerson* [1956] Crim.L.R. 415.

[Report and commentary by ALISTAIR R. BROWNLIE, S.S.C.]

Identification—photograph shown to witness after arrest of accused —no identification parade—failure of defending counsel to object at the trial

R. v. Seiga

Court of Criminal Appeal: Ashworth, Salmon and Elwes JJ.: June 12, 1961: *The Times*, June 13, 1961.[4]

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[3] For the appellants: *Solicitor-General Anderson, Q.C., Wylie, A.-D.* (instructed by Lionel I. Gordon, Crown Agent). For the respondents: *Walker* (instructed by R. M. Sorbie, Solicitor, Edinburgh).

[4] For the appellant: *A. Carus* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *G. Bean* (instructed by Messrs. Jeans & Bottomley).

S. was convicted at quarter sessions of receiving a stolen tape-recorder. The evidence for the prosecution at the trial included that of a Mrs. K. who identified S. as the man who had sold the machine to her husband. After S.'s arrest on other charges (concerning a television set), Mrs. K. had been shown nine photographs, including a photograph of S., and she had, without hesitation, picked out the photograph of S. as the man concerned with both the television set and the tape-recorder. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that it had been contended that the conduct of the detective-constable in showing to Mrs. K. the photograph of S. after his arrest was in conflict with well-established practices and principles laid down by this court, particularly, in the cases of *R.* v. *Goss* (1923) 17 Cr.App.R. 196, and *R.* v. *Haslam* (1925) 19 Cr.App.R. 59. However, in the present case, unlike the cases cited, there had been no identification parade and no explanation had been given for the omission to hold one. In the circumstances, this court could not but regard the conduct of the detective-constable as unsatisfactory. If the only evidence of identity had been that of Mrs. K., this court might well have allowed the appeal. However, Mr. K. had also identified S. at the trial. Moreover, there had been a substantial gap in time between the date when Mrs. K. saw the photograph and the date when she was called to identify S. in court. Further, no objection had been taken to the admission of the evidence as to photographs either before the justices or at the trial. A further point taken on behalf of the appellant was that no warning was given to the jury either as to the impression possibly created by police photographs. This matter had been recently dealt with in *R.* v. *Lawrenson* [1961] Crim.L.R. 398, which made it clear that such a direction was a matter for the discretion of the trial judge. While this court disapproved of the conduct of the detective-constable, neither that conduct nor the absence of any warning as to the photographs afforded sufficient ground for setting aside the conviction. [H. P.]

Commentary. See the commentary on *R.* v. *Lawrenson* [1961] Crim.L.R. 398. When the accused had been arrested, there was no apparent, valid reason for showing the witness the photograph, and the proper course would have been to hold an identification parade.

The fact that there had been a substantial gap in time between the date when Mrs. K. saw the photograph and the date when she was called on to identify S. in court, would seem to have only a slightly mitigating effect on the unsatisfactory nature of the evidence; for it does not remove Lord Hewart's objection that " a person who has seen a photograph of the accused person may identify him simply because he has seen a photograph of him: *R.* v. *Haslam* (1925) 19 Cr.App.R. 59.

Moreover, it would seem doubtful whether the accused's counsel's failure (or, *a fortiori*, his own failure) to object to the admission of the evidence ought, in justice, to be taken into account against the accused on appeal. Reliance upon such a consideration might give the impression of punishing a man because of the inadequacy of his counsel or his own failure to understand the law of evidence.

In *R.* v. *Davis* (1909) 2 Cr.App.R. 133, Darling J. said that even if the evidence in that case had been wrongly admitted still, " if counsel on the other side do not object, it is not obligatory on the judge to do so. When a prisoner is defended by counsel, and he chooses, for reasons of his own, to allow such evidence to be let in without objection, he cannot come here and ask to have the verdict revised on that ground." In argument, Darling J. had suggested that no objection was made because it was desired to wait for the Court of Criminal Appeal —which if established, would be a different case—but this was denied by counsel. Roscoe, *Criminal Evidence* (16th ed.) 116, doubts whether this dictum is correctly reported. In any case, it was obviously coloured by Darling J.'s suspicion that counsel deliberately withheld his objection in the hope of getting the conviction quashed in the Court of Criminal Appeal. It is respectfully submitted that an inadvertent failure to object ought not to prejudice the appeal in any way. *Cf.*, however, *R.* v. *Smith* [1956] Crim.L.R. 843.

FOOD AND DRUGS

Food and Drugs Act, 1955, s. 8 (1)—pork pie with mould—meaning of " unfit for human consumption "

David Greig, Ltd. v. Goldfinch

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Finnemore and Salmon JJ.: *The Times*, April 14, 1961.[5]

G. was charged with selling a pork pie intended for, but unfit for, human consumption, contrary to section 8 (1) of the Food and Drugs Act, 1955.

The justices found that at about 9.30 a.m. on Saturday, July 9, 1960, a customer bought the pie which had been baked on Tuesday, July 5, and delivered to the store on the following day. When the customer returned home she unwrapped the pie and placed it on a plate in a ventilated kitchen cabinet. At about 5 p.m. she took the pie out of the cabinet and cut it. The pie contained small patches of mould underneath the top crust. She replaced it in the cupboard and on the following Monday morning took it to the public health inspector, by which time the patches of mould had developed further and covered an area of the approximate size of a half-crown piece. The mould was of the penicillin type which of itself was not harmful to human beings. Although the weather was ideal for the development and increase of mould, at the time of sale some mould, albeit a small amount, was present on the underside of the crust: the area covered by the mould was not very large.

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[5] For G.: *John Wood* (instructed by Lovell, White & King). For the prosecutor: Sharpe, Pritchard & Co., for A. J. Goldfinch, Bexleyheath.

The justices, being of the opinion that the presence of the mould rendered the pie unfit for human consumption, convicted G.

Held, dismissing an appeal by G., that where an article of food was going mouldy, prima facie, it was " unfit for human consumption "; it was a matter of degree in every case; and it could not be said that the justices were wrong.

Per Lord Parker C.J.: I do not propose to say exactly what is meant by the expression " unfit for human consumption." I agree that it means something more than unsuitable—a stale loaf is unsuitable though not unfit for human consumption—but I am not prepared to say that in every prosecution under section 8 the prosecutor must prove that if a person ate the food it would be injurious to his health or dangerous to him. [D. C.]

Commentary. *Cf. Kyle* v. *Laird,* 1951 S.L.T. 373 where the Lord Justice-Clerk, in holding that there was evidence on which a magistrate could find that a pint of milk was unfit for the food of man under the Public Health (Scotland) Act, 1897, where there were dirty patches on the inside of the bottle, said: " What makes milk unfit for the food of man seems to me to be very much a question of circumstances, and these circumstances must be infinitely varied . . . I do not think it possible to lay down any hard and fast test. This is the sort of thing to be looked at in a practical common sense way." Complications have, however, sometimes arisen in the interpretation of the phrase " unfit for human consumption " because of the necessity of reading the Act as a whole. *Cf. Miller (J.) Ltd.* v. *Battersea Borough Council* [1955] 3 All E.R. 279 and [1955] Crim.L.R. 779.

FRAUD

Prevention of Fraud (Investments) Act, 1958, s. 13 (1)—meaning of " the reckless making of any statement, promise or forecast "

R. v. Grunwald

Central Criminal Court: Paull J., and a jury: [1961] 2 W.L.R. 606.[6]

Two defendants were charged on indictment with inducing agreement for the disposal of securities by the making of reckless statements, contrary to section 13 (1) (*a*) (i) of the Prevention of Fraud (Investments) Act, 1958.

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[6] For the Crown: *J. M. G. Griffith-Jones*, *J. C. Mathew* and *B. L. Leary* (instructed by the Director of Public Prosecutions). For the defendants: *F. W. Beney, Q.C.*, *W. G. Wingate* and *W. A. Macpherson* (instructed by Stafford Clark & Co.), *F. H. Lawton, Q.C.*, and *R. M. O. Havers* (instructed by Wontner & Sons), and *Morris Finer* and *M. D. Sherrard* (instructed by D. J. Freeman & Fraser).

Section 13 (1) provides: " Any person who . . . by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person—(*a*) to enter into or offer to enter into—(i) any agreement for, or with a view to, acquiring, disposing of, subscribing for or underwriting securities . . . shall be guilty of an offence, and liable to imprisonment for a term not exceeding seven years."

Paull J. *held* that in order to convict an accused of the "reckless " making of a statement or a promise, the jury must be satisfied (i) that the statement or promise was in fact made; (ii) that it was a rash statement or promise to make; and (iii) that the person who made the statement or promise had no real basis of facts on which he could support the statement or promise. [D. C.]

Commentary. The meaning of the word " reckless " in the Prevention of Fraud (Investments) Act has provoked a difference of judicial opinion. In *R.* v. *Bates* (1952) 36 Cr.App.R. 175 Donovan J. directed the jury that it meant " ' careless,' ' heedless,' ' inattentive to duty.' " According to this direction, mere negligence, which would not ground a civil action in deceit, would suffice for this criminal offence and an honest but careless man could be convicted. Salmon J. dissented from this construction in *R.* v. *Mackinnon* [1959] 1 Q.B. 150, holding that negligence is not enough, and that it is necessary for the prosecution to establish that the accused did not honestly believe in the truth of what he said, thus giving to the term the meaning which, it is submitted, it ordinarily bears in both the criminal and the civil law. *Cf.* Dr. Cross's description of recklessness, above, pp. 510–511.

Donovan J.'s direction was approved by the Court of Criminal Appeal but, as the jury had not been asked to return a verdict on the count containing the word " reckless," this was admittedly *obiter*. *Bates* has been severely criticised by Dr. Glanville Williams (*The Criminal Law,* 121). Donovan J.'s view was, however, preferred by Judge Aarvold in a retrial which became necessary in *Mackinnon.*

Paull J. in the present case said that he did not agree with either Donovan J. or Salmon J. and that, as he had reached a perfectly clear conclusion, it was his duty to express yet a third meaning of the word. Substantially, however, Paull J. appears to agree with Donovan J., for both these judges hold that the word covers the case of a man who is honest but negligent. Thus Paull J. said: " A statement or promise may be reckless although the person making it, in some vague way, thinks that the statement is true or the promise warranted." The only difference between them would seem to be in the degree of negligence required, a matter incapable of precise definition, in any event. Paull J. would say that " carelessness " is not enough but " heedless rashness " is. The difference is only one of degree. On the other hand there is a difference in kind between honesty and dishonesty and Salmon J.'s test provides a sharp dividing line between innocent and guilty conduct. This, in itself, is an important consideration; but more persuasive are the facts that this is an Act for the prevention of *fraud*, the term "fraud" is used in the cross-heading of the section and fraud is the essence of the other offences created by the section. Negligence, even if so gross as to amount to "heedless rashness," is not fraud and it may be questioned whether it is desirable that it should be subject to a sentence of seven years' imprisonment. It is respectfully submitted that the view of Salmon J. is to be preferred.

HOMICIDE

Capital murder—knife wounds—evidence that cause of death might have been heart disease

R. v. Pankotai

Court of Criminal Appeal: Slade, Glyn-Jones and Megaw JJ.: June 5, 1961: *The Times*, June 6, 1961.[7]

P. was convicted at assizes of capital murder. The facts were that P. had broken into the deceased's house and ransacked it. The deceased returned unexpectedly and a fight ensued in the course of which the deceased received knife wounds. The deceased subsequently died. The evidence called for the prosecution included that of Professor P., who said that there was a remote possibility that the deceased might have died from heart disease independently of his wounds. P. appealed to the Court of Criminal Appeal on two grounds: (i) that the trial judge had wrongly rejected a submission by the defence that upon the evidence adduced by the prosecution there was no case to go to the jury, and (ii) that the trial judge had wrongly directed the jury that it was open to them on the evidence of Professor P. to find that beyond reasonable doubt the death of the deceased was caused by the injuries inflicted by the appellant.

Held, dismissing the appeal, that the case was purely one for the jury since there was abundant evidence on which they could find that the injuries inflicted by the appellant had caused or contributed to, or precipitated the death of, the deceased. Accordingly, the appeal would be dismissed. [H. P.]

Commentary. If the injuries inflicted by P. accelerated the deceased's death, the fact that he would or might soon have died from heart disease would be no answer to the charge: *R.* v. *Dyson* [1908] 2 K.B. 231. But where the act done with intent to kill made no contribution whatever to the ensuing death, the accused could not be convicted of murder, though he was guilty of an attempt: *R.* v. *White* [1910] 2 K.B. 124. If, however, in the present case, the sole cause of the death had been heart disease, the accused could not have been convicted of attempted murder, for he had no intent to kill but only to do grievous bodily harm.

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[7] For the appellant: *Henry Scott, Q.C.*, *Charles Dean* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Alastair Sharp, Q.C.*, *Gilbert Hartley* (instructed by the Director of Public Prosecutions).

Manslaughter—causing death by administering household cleanser—"common design" by accused and deceased

R. v. Pike

Court of Criminal Appeal: Ashworth, Salmon and Elwes JJ.: June 5, 1961.[8]

P. was convicted at assizes of manslaughter.[9] The facts were that P.'s mistress died after inhalation of a substance known as carbon tetrachloride (commonly called C.T.C.). There was some evidence that P. himself administered the C.T.C. to her for the purpose of increasing sexual satisfaction. There was other evidence that P. merely provided the C.T.C., which the deceased then inhaled. The trial judge left three questions to the jury: (1) Did P. himself administer the C.T.C.? (2) Were P. and the deceased acting together in a common design that she should inhale C.T.C., he providing it and she inhaling it "both of them intending and desiring that she should so act, so that in your view he must equally bear the responsibility for her so inhaling"? (3) Did P. know that inhaling C.T.C. would expose the deceased to the danger of physical harm, and yet recklessly cause or allow her to inhale it? On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that there was no doubt that the first question left to the jury meant: Did P. administer the C.T.C. by putting it on a rag and putting the rag on the woman's face? As to the second question, it had been argued that there was nothing unlawful in the action of the victim in inhaling C.T.C. and that the doctrine of "common design" was wholly out of place unless the act in question was a crime or involved a conspiracy. However, what the judge was leaving to the jury was the possibility that P. was not responsible for the whole of the acts leading to the inhalation but had taken such part in the acts leading up to the inhalation as to involve his responsibility therefor. The direction was really a direction upon the scope of the word "administered."

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[8] For the appellant: *Elwyn Jones, Q.C.. J. S. R. Abdela* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Owen Stable* (instructed by the Director of Public Prosecutions).

[9] See [1961] Crim.L.R. 114.

There was nothing in law to prevent a charge of manslaughter being brought against a man who did not himself carry out the whole of the action resulting in the death so long as he was and could be described as an effective cause of the action which led to the death and knew of the danger involved in such action. As to the third question left to the jury, it was not surprising, on the evidence of P.'s statement and other matters, that the jury had found that P. was acting recklessly. It was true that the word "allow" had been used in the phrase "cause or allow her to inhale C.T.C." but, in the light of the direction on common design, the jury could not have been under the impression that mere failure to stop the woman constituted guilt. Accordingly, the appeal would be dismissed. [H. P.]

Commentary. See the commentary on the report of the trial at [1961] Crim.L.R. 116. It is clear that to aid and abet the deceased to administer to herself a thing known to be dangerous to life is at least manslaughter and might, at an earlier and stricter period of the common law, have been held to be murder. Of course there is a difference between aiding and abetting and "allowing." A mere failure to intervene, unless the act being done constituted a felony, would entail no liability in the absence of some special duty.

MERCHANDISE MARKS

Merchandise Marks Act, 1887, s. 2—whisky with excess of water —whether all reasonable precautions taken

Cripps v. Forrest

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Gorman and Salmon JJ.: *The Times*, April 20, 1961.[10]

F. was charged with selling whisky to which a false trade description was applied, contrary to section 2 of the Merchandise Marks Act, 1887. It was alleged that three double whiskies bought by the prosecutor were 66 per cent. instead of 70 per cent. proof, an excess of water amounting to 5·7 per cent. The justices found that F. had taken all reasonable precautions against committing an offence, and dismissed the summons.

On appeal, it was said, on behalf of the prosecutor, that F. had said he had instructed his employees that any unclaimed drinks were to be put at the back of the counter and if unclaimed at closing time were to be identified. Those identified as straight spirits were returned to the bottles from which they were served and mixed drinks were thrown away. According to F. it often happened that people ordered drinks and then went away before paying for them.

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[10] For the prosecutor: *Paul Wrightson* (instructed by Sharpe, Pritchard & Co. for G. T. Heckels, Maidstone). For F.: *Robin Simpson* (instructed by Girling, Wilson & Harvie, Canterbury).

It was said, on behalf of F., that there had never been any allegation of fraud. The incident occurred at the height of the season when there were sometimes 500 or 600 people in the public-house. Very often someone asked for the wrong drink or the barman took it from the wrong bottle and those drinks were, on Mr. Forrest's instructions, put at the back of the counter. Only the landlord, the full-time barman and his wife were allowed to put the drinks back in the bottles. Employees were instructed only to put drinks they definitely knew to be straight drinks underneath the particular optic dispenser.

Held, allowing the appeal, that F. could not avail himself of the statutory defence that he had taken all reasonable precautions: it would be inevitable that on occasions a glass containing whisky and water, whisky and soda or whisky and ice would find its way back opposite the optic dispenser and, at the end of the day, be put back into the bottle. [D. C.]

Commentary. The statutory defences provided by section 2 of the Merchandise Marks Act have sometimes been construed very narrowly and unfavourably to the accused; *cf. Kat* v. *Diment* [1951] 1 K.B. 34 and *Mercer* v. *Pyramid Sand and Gravel Co.* (1944) 109 J.P. 54. The present decision, however, seems with respect an entirely reasonable one. The onus of proving the defence is put by the statute on the prisoner and he therefore fails unless he can establish his case on a balance of probabilities.

MERCHANT SHIPPING

Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 44—overloading—increase of earning capacity—power to impose additional fine

Rutberg v. Williams

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Lawton JJ.: 125 J.P. 338.[11]

R., the master of a Swedish vessel, was charged with a contravention of section 44 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932.

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[11] For R.: *Michael Mustill* (instructed by Holman, Fenwick & Willan for Lean & Lean, Cardiff). For the respondent: *J. R. Cumming-Bruce* (instructed by the Treasury Solicitor).

By section 44: "(1) A British load line ship registered in the United Kingdom shall not be so loaded as to submerge in salt water, when the ship has no list, the appropriate load line on each side of the ship, that is to say, the load line indicating or purporting to indicate the maximum depth to which the ship is for the time being entitled under the load line rules to be loaded. (2) If any such ship is loaded in contravention of this section, the owner or master of the ship shall for each offence be liable to a fine not exceeding £100 and to such additional fine, not exceeding the amount hereinafter specified, as the court thinks fit to impose having regard to the extent to which the earning capacity of the ship was, or would have been, increased by reason of the submersion. (3) The said additional fine shall not exceed £100 for every inch or fraction of an inch by which the appropriate load line on each side of the ship was submerged, or would have been submerged if the ship had been in salt water and had no list. . . ."

It was established that the vessel was loaded with a full cargo of iron ore at Halsingborg and arrived in Cardiff on September 19, 1960, after a voyage of five days. On arrival the ship was found to be loaded so as to submerge the appropriate load line on each side of the ship in salt water to a depth of 2·85 ins.

The magistrate was of the opinion that he had power to impose an additional fine, having regard to the fact that the ship was obviously engaged on a commercial venture, and he saw no reason to suspect that the earning capacity had not been increased by the overloading. The magistrate, accordingly, imposed a fine of £100, plus an additional fine of £300.

Held, allowing an appeal by R., that in the absence of any evidence as to the extent of any increase in the earning capacity of the ship, the magistrate had no jurisdiction to impose an additional fine, and that the additional fine of £300 must be quashed. [D. C.]

Commentary. It seems to be an almost irrresistible inference that the earning capacity is increased to some extent by the overloading. The magistrate must, however, have regard to the *extent* to which the earning power is increased and, as to this, he apparently had no evidence.

Cf. St. John Shipping Corporation v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267 where Devlin J. said that he supposed that in 1932, £100 was considered an outside figure of earning capacity per inch, but freights are very different now from what they were then: "A maximum fine which at the time when Parliament fixed it would have been regarded as a sharp disincentive . . . may now prove to be little or no deterrent." Might not the court have taken judicial notice of this state of affairs and reasonably inferred that the earning power had been increased by at least £100 per inch? It would not have been surprising if the prosecution had relied on the rule whereby the onus of proving certain facts which are peculiarly within the knowledge of the accused is placed on him: but it is submitted that it is undesirable that that rule be extended further.

ROAD TRAFFIC

Driving under the influence of drink—overwhelming evidence—perverse decision of justices

Dryden v. Johnson

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Gorman and Salmon JJ.: *The Times,* April 20, 1961.[12]

J. was charged with driving whilst under the influence of drink. He was seen by a police officer driving into a car park at 10 minutes past midnight. He got out of his car with some difficulty, was unsteady on his feet, his breath smelt of drink, he was swaying and his voice was slurred. He confessed that he had had " a couple of pints and two whiskies." He was taken to a police box and tried to sit on a stool but knocked it over and fell. A police doctor examined him at the police station at 12.35 a.m. and he could not articulate properly, staggered, was unable to stand, wrote illegibly and could not walk in a straight line. He could not put on his shoes and socks while seated. A test showed that he had had a minimum of five pints of beer and five double whiskies and the concentration of alcohol was very high. At 3 a.m. he was asleep in his cell and could not be roused.

The justices stated that although J. was under the influence of drink and incapable of driving when examined at a police station, they were not satisfied that he had been under the influence when driving a car 25 minutes earlier.

Held, allowing an appeal by the prosecutor, that the decision of the justices was thoroughly perverse, and that the case must be sent back with a direction to convict.

Per Salmon J.: The argument on J.'s behalf would not have deceived an ordinarily intelligent child of twelve, let alone a bench of magistrates doing their best to arrive at a just result in accordance with the evidence. [D. C.]

Commentary. The evidence, in the view of the Divisional Court was so overwhelming that no reasonable jury or bench of magistrates could fail to be satisfied beyond reasonable doubt.

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[12] For the appellant: *Paul Wrightson* (instructed by Sharpe, Pritchard & Co., agents for N. K. Cooper, County Prosecuting Solicitor, Maidstone). The respondent did not appear and was not represented.

Driving under the influence of drink—Road Traffic Act, 1956, *s.* 9, *proviso—driving on a road or other public place*

John v. Bentley

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Gorman and Salmon JJ.: April 21, 1961.[13]

A defendant was charged for that he, being in charge of a motor-vehicle, but not driving the vehicle, was unfit to drive the vehicle, in that he was under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to section 9 of the Road Traffic Act, 1956.

The facts (as set out in the judgment of the Divisional Court) were as follows. Three men, one of whom was the defendant, went out on a drinking expedition. They drove from Dunstable to Eaton Bray in a vehicle belonging to the defendant's employers in order to get dead drunk and an agreement was made that if they became incapable through drink, they would either stay the night at the public house or find alternative transport to get themselves back to their homes. They proceeded to get drunk. One man did stay at the public house. The defendant and the other man were found at 11 p.m. that night in the motor-vehicle in Dunstable about a quarter of a mile away from the defendant's place of work. The man with the defendant was seen getting out of the cab on the driver's side, and it was said, no doubt truthfully, that he got out to be sick. The defendant was found on the floor of the cab vomiting. He was taken to the police station and one of the policemen who took him said that he was dead drunk. He slept all through the night even during the medical examination, and the doctor, try as he might, could not wake him. The doctor said that he had never seen a man so drunk. At 10 a.m. the next day he was found to be coherent. Quarter Sessions found that although the defendant was in charge of the car, he had not, between his becoming unfit to drive and the material time, driven the vehicle on a road or other public place.

Quarter Sessions were satisfied that the defendant had proved that at the material time there was no likelihood of his driving the vehicle so long as he remained unfit to drive.

Held, dismissing an appeal by the prosecutor, that although this defence was intended to be directed to an entirely different set of circumstances, the words of the proviso were sufficiently wide to cover the present case; and there was evidence upon which Quarter Sessions could come to the conclusion which they did, which could not be said to be an unreasonable conclusion. [D. C.]

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[13] For the prosecutor: *E. Stockdale* (instructed by Michael Wynter & Co., Luton). For the defendant: *A. Abrahams* (instructed by Machin & Co., Dunstable).

Road and Rail Traffic Act, 1933, s. 2 (4)—private "C" licence—carriage of goods for hire or reward—meaning of "goods"

Sweetway Sanitary Cleansers, Ltd. v. Bradley

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Lawton JJ.: [1961] 3 W.L.R. 196.[15]

S. was charged with failing to comply with the special conditions attached, by virtue of section 2 (4) of the Road and Rail Traffic Act, 1933, to a private "C" carrier's licence, namely, using a vehicle on a road for the carriage of goods for hire or reward.

By section 1 (5) (*b*) of the Act: "The delivery or collection by a person of goods which have been, or are to be, subjected to a process or treatment in the course of a trade or business carried on by him . . . shall not be deemed to constitute a carrying of the goods for hire or reward."

S. was a private limited company, carrying on the business of emptying and cleaning septic tanks, cesspools and the like. The vehicle concerned was the subject of a "C" licence. On December 18, 1960, by arrangement with the proprietor of a country club, the vehicle went on to the club premises and there emptied and cleaned a septic tank. The operation involved the pumping into the tank of some disinfectant, the pumping out of the contents of the tank into the tank mounted on the vehicle, and the disinfecting of the drain lines from the premises into the septic tank. The vehicle was then driven, after some disinfectant had been put into the tank containing the effluent, along the highway to a farm some quarter of a mile distant. There, by arrangement with the owner of the farm, the effluent was discharged and spread on the ground in the manner of manure. S. charged the secretary of the club £3 10s., expressed to be for hire of equipment and labour, which was the standard charge for the work.

Held, dismissing an appeal against conviction, that the effluent was "goods" which were being carried by S. in connection with their trade or business of contractors; the cost of carriage could not be regarded as coming under the head of *de minimis*, and a substantial part of the £3 10s. must be regarded as referable to the disposal of the effluent, and the " goods " were accordingly being carried for hire or reward; the adding of the disinfectant could not be regarded as subjecting the effluent to a process or treatment within the meaning of section 1 (5); there had been no passing of property in the effluent to S. [D. C.]

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[15] For S.: *M. A. B. King-Hamilton, Q.C.*, and *J. R. C. Samuel-Gibbon* (instructed by Jaques & Co., for Wellington & Clifford, Gloucester). For the respondent: *J. R. Cumming-Bruce* (instructed by the Treasury Solicitor).

Commentary. The term " goods " is widely defined in the Act (s. 36) to include " goods or burden of any description." *Cf. Clarke* v. *Cherry* [1953] 1 W.L.R. 268 and *Wyles* v. *White* [1958] Crim.L.R. 693.

Road Traffic Act, 1960, s. 241—accused not the registered owner of the vehicle—no evidence that notice of intended prosecution had not been served on registered owner

Sanders v. Scott

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Gorman and Salmon JJ.: [1961] 2 W.L.R. 864.[16]

S. was charged with dangerous driving. S. was driving the motor-vehicle concerned at the time of the alleged offence, but was not the registered owner of it. No warning of intended prosecution was given to S. at the time, nor was a summons issued within fourteen days, nor was a notice of intended prosecution served on him. There was no evidence whether or not such a notice had been served on the registered owner of the motor-vehicle. The justices were of the opinion that the requirements of section 241 of the Road Traffic Act, 1960, had not been complied with, and dismissed the information.

Held, allowing an appeal by the prosecutor, that section 241 must be construed strictly. Subsection (3) placed the burden of proof on the defendant. Under subsection (2) (*c*) there were two clear alternatives, and the notice could either be served on the driver or on the registered owner. Since S. had not called the registered owner or proved that no notice had been served on him, he had not discharged the burden of proof which was upon him. [D. C.]

Commentary. Is there any reason why, on the case being remitted to the justices, the accused could not have then called the registered owner (or the police officer) to prove that notice had not been served?

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[16] For the prosecutor: *R. E. Hammerton* (instructed by Sharpe, Pritchard & Co., for A. C. Brewer, Blackpool).

Road Traffic Act, 1960, s. 110—driving a motor-scooter while disqualified—meaning of "driving"

R. v. Munning

Bridgend Magistrate's Court: Chairman: Colonel Charles T. Edmondes: June 13, 1961.[17]

In January 1961, M. was disqualified from driving. While still under this disqualification he agreed with a young lady to collect her motor-scooter from a place 7 or 8 miles away and push it to her home as, she explained, the scooter was not in working order. When running along pushing the scooter in order to get it up a hill he was stopped by a police officer and charged with driving the vehicle while disqualified contrary to section 110 of the Road Traffic Act, 1960.

The police officer stated that the scooter appeared to be roadworthy since, although the throttle cable was snapped, the throttle could still be worked by pulling the cable. He agreed, however, that at no time had he seen the defendant astride the machine and that the ignition switch was operated by a key which was not on the scooter nor in the defendant's possession.

For the defence it was urged that despite the decision in *Saycell* v. *Bool* [1948] 2 All E.R. 83, the magistrates should take the common-sense view of the meaning of "driving" and dismiss the charge as there was no evidence that the defendant had ridden astride the scooter. A case reported in 104 S.J. 218 was referred to in which the accused was acquitted of taking and driving away, having pushed a motor-cycle for some yards without starting the engine.

Held, that the charge should be dismissed as it is common sense that pushing is not driving. [R. E. S.]

Commentary. The answer may be a common-sense one but it is not easily reconcilable with the authorities. Whether driving is "making the vehicle go," as Lord Goddard said in *Wallace* v. *Major* [1946] K.B. 473 or controlling the brakes and steering of the vehicle as he said in *Saycell* v. *Bool*, the accused would seem to have been driving. The only real distinction between this case and *Saycell* v. *Bool* seems to be that in the latter case the accused controlled the vehicle from the driving seat, whereas here the accused was never astride the machine. It is unfortunate that it should have become necessary to make such subtle distinctions on the interpretation of the Act. *Cf. R.* v. *Spindley* [1961] Crim.L.R. 486 and commentary thereon in which it is suggested that, regard being had to the mischief of the statute, it might not have been unreasonable to hold that anyone exercising any degree of control over the motion of a vehicle is driving it for this purpose. Such a rule might operate somewhat harshly in a case such as the present; but account could be taken of the special circumstances of the case in the imposition of sentence.

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[17] For the prosecution: Chief Inspector D. J. Davies. For the Defence: Mr. Royden E. Snape of Messrs. Walter P. David & Snape, Solicitors.

Road Traffic Act, 1960, s. 110—driving whilst disqualified—election to go for trial—sentence

See R. *v.* Mulloy, below, p. 558.

Vehicles (Excise) Act, 1949, s. 15—meaning of "mechanically propelled vehicle"—car with no engine

Newberry v. Simmonds

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Winn and Widgery JJ.: [1961] 2 W.L.R. 675.[18]

S. left his motor-car, for which he had no vehicle excise licence, in a public road for a period of about four weeks. He was charged with having kept on a public road a mechanically propelled vehicle, for which a licence under the Vehicles (Excise) Act, 1949, was not in force, whereby he became liable to the penalty provided by section 15 of the Act. He told the justices that at some time prior to the period in question the engine of the car had been stolen by some person who was unknown to him. From outward appearances, the car appeared to be an ordinary motor-car. The justices, considering that the prosecution had failed to prove that the car had an engine in it, and that, if there were no engine in it, it was not a mechanically propelled vehicle which required an excise licence, dismissed the information.

Held, allowing an appeal by the prosecutor, that prima facie the phrase "mechanically propelled vehicle" in the Vehicles (Excise) Act, 1949, had the same meaning as it had in the Road Traffic Act, 1930, and that a motor-car did not cease to be a mechanically propelled vehicle on the mere removal of the engine, if the evidence admitted the possibility that the engine might shortly be replaced, and the motive power restored. The absence of the engine, therefore, was not conclusive, nor was the evidence of S. sufficient to take what was in other respects an ordinary motor-car out of the classification of a mechanically propelled vehicle, so that, on the totality of the evidence, the justices had no alternative but to find the charge proved. [D. C.]

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[18] For the prosecutor: *Paul Wrightson* (instructed by J. G. Barr). S. did not appear and was not represented.

Commentary. The court held that, prima facie, the words "mechanically propelled vehicle" have the same meaning in the Vehicles (Excise) Act, 1949, as in the Road Traffic Act, 1930, and followed *Floyd* v. *Bush* [1953] 1 W.L.R. 242 where the court held that, for the purposes of the latter Act, a pedal cycle fitted with an auxiliary motor in efficient working order was a motor-vehicle although the motor was not in use and the cycle was being pedalled along the road. The court in that case distinguished *Lawrence* v. *Howlett* [1952] 2 All E.R. 74 where it was held that a similar cycle had ceased to be a mechanically propelled vehicle when certain essential parts of the engine—cylinder, piston and connecting rod—had been removed. *Lawrence* v. *Howlett* was again distinguished in the present case, though no clear grounds of distinction appear to be stated. The court probably had in mind the distinction drawn by Devlin J. in the former case between vehicles with one and vehicles with two means of propulsion. After pointing out that a motor-car is still being used as a mechanically propelled vehicle whether or not it is in working order or being driven on a free wheel or driven down hill with the engine disengaged, he went on: "Where, however, a vehicle is designed to have two means of propulsion, one mechanical and the other non-mechanical, different questions are raised, and to see into which classification it comes regard must be had to its working condition and the use to which it is being put at the material time."

Comparison may also be made with *Elliot* v. *Gray* [1959] 3 W.L.R. 956; [1960] Crim.L.R. 63, where it was held that a motor-car was being used on the road although it had broken down and could not be driven.

SCOTS LAW

Food and Drugs (Scotland) Act, 1956, s. 6 (1)—secondary evidence

See McLeod *v.* Woodmuir Miners' Welfare Society Social Club, above, p. 541.

SENTENCE

Costs in Criminal Cases Act, 1952, s. 2—costs when taxed amounting to more than double the amount of the fine

R. v. Gander, Gershon and Kartum

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Salmon JJ.: June 7, 1961: *The Times*, June 8, 1961.[19]

The appellants were convicted at quarter sessions of conspiracy to cheat and defraud persons attending mock auctions. Gander and Gershon were also convicted of stealing £2. Gershon was fined £600 and ordered to pay four-fifths of the costs. Gander and

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[19] For the appellants: *F. Ashe Lincoln, Q.C., J. E. Ricardo* (instructed by Messrs. Lincoln & Lincoln). The Crown was not represented.

Kartum were fined £200 and £100 respectively and each ordered to pay one-tenth of the costs. On appeal to the Court of Criminal Appeal on the question of costs:

Held, that when the recorder had made the order, he could not have known that the costs would be taxed at a figure of over £1,600, although a leader had been engaged and the trial had lasted five days. The different fractions of costs ordered meant that Gershon was being called upon to pay costs amounting to more than double his fine of £600. This court had concluded that, if the recorder had known the amount involved, he would not have made the order. Accordingly, the order would be varied so as to order Gershon to pay £400 and Gander and Kartum £50 each in respect of costs. [H. P.]

Commentary. By the Costs in Criminal Cases Act, 1952, section 2, a court of assize or quarter sessions before which any person is convicted may, if it thinks fit, order him to pay the whole or any part of the costs incurred in or about the prosecution or conviction, including any proceedings before the examining justices.

Offence triable summarily—election to go for trial—offence punishable on summary conviction with six months' maximum—power of quarter sessions to exceed this maximum

R. v. Mulloy

Court of Criminal Appeal: Lord Parker C.J., Barry and Hinchcliffe JJ.: March 27, 1961: *The Times*, March 28, 1961.[20]

M. pleaded guilty at quarter sessions to driving whilst disqualified and was sentenced to twelve months' imprisonment. On appeal to the Court of Criminal Appeal:

Held, that the offence of driving whilst disqualified was one which could be tried summarily by virtue of section 110 of the Road Traffic Act, 1960, and it was provided that on summary conviction the offender should be liable to a sentence not exceeding six months' imprisonment. The appellant in the present case had elected to go for trial but had pleaded guilty at quarter sessions. The question which now arose was whether quarter sessions were limited as to sentence in the same way as in the case of a summary trial. That very point had arisen in *R.* v. *Bishop* (1959) 43 Cr. App.R. 177, where the court said: "It seems plain that the provision . . . that a prisoner is liable on summary conviction to imprisonment for a term not exceeding six months means that he is liable on conviction in proceedings initiated in a court of summary jurisdiction." Quarter sessions had, therefore, no jurisdiction to pass the sentence of twelve months' imprisonment and, accordingly, the sentence would be reduced to one of six months' imprisonment. [H. P.]

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[20] The appellant appeared in person. The Crown was not represented.

Commentary. In *R.* v. *Bishop* it was argued that while the maximum punishment on summary trial was six months, if the prisoner elected to be tried at sessions the punishment was entirely at large. The rule laid down in that and the present case no doubt applies to all cases of summary offences in which the accused can demand trial on indictment. It would presumably not apply to an offence that is both summary and indictable—but the invariable practice in such cases is to specify maximum sentences for both types of proceeding.

TRIAL

Alibi—direction to jury—adverse comments

R. v. Bassnett

Court of Criminal Appeal: Ashworth, Salmon and Elwes JJ.: June 5, 1961.[21]

B. was convicted at a Crown Court of office-breaking and larceny. One of B.'s defences at the trial was an alibi (that he was at a party at a public-house) in support of which B.'s wife gave evidence. The jury were directed on the question of the alibi as follows: "An alibi is an old creature of the courts. It finds its way into a case again and again and judges have always warned juries to be very careful of alibis in certain circumstances. This young man and his wife say 'I have no association with the matter in question in this case because I was elsewhere.' I have given you the classic warning, the normal warning, that an alibi has to be scrutinised with almost microscopic care, and the further away the alibi is from the offence to which it is co-related, the more you must be careful." Later in the summing-up, the recorder said: "Therefore, perhaps you will view, at any rate with a suspicious microscopic sense of inquiry, this alibi trotted out at what may be the twenty-fourth or twenty-fifth hour, supported by the most interested party, the accused, and the second most interested party, the wife of the accused, in the absence of other participants in the party, and that is a very important matter indeed." On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that with regard to the "warning" as to the scrutiny of the alibi, all that this court thought necessary to say was that it was not a classic warning nor even a normal feature of a summing-up. There was no foundation whatever for the suggestion that there was any burden on a jury to examine an alibi put forward by the defence with microscopic care. With regard to the recorder's further comments, a court was at liberty to comment upon an alibi produced at a late stage, but the comments in the present case were partial and adverse to the accused and went far beyond what was justified. There were further misdirections in the summing-up and, in the circumstances, the convictions ought not to be allowed to stand. [H. P.]

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[21] For the appellant: *R. H. Montgomery* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *C. Cunliffe* (instructed by the Prosecuting Solicitor, Liverpool).

Commentary. In setting up an alibi the prisoner is doing no more than denying that the prosecution has proved its case and if he is able to do no more than raise a reasonable doubt in the jury's minds whether his story might not be true, he is entitled to be acquitted. It was held that the judge may properly comment on the lateness at which an alibi is raised in *R.* v. *Littleboy* (1934) 24 Cr.App.R. 192.

Direction to jury on burden of proof—" reasonably sure "

R. v. Head and Warrener

Court of Criminal Appeal: Ashworth, Salmon and Elwes JJ.: June 12, 1961: *The Times*, June 13, 1961.[22]

H. and W. were convicted at quarter sessions of receiving a radio set knowing it to have been stolen. The jury were directed on the burden of proof as follows: ". . . it is always the duty of the prosecution to prove their case so that you are reasonably sure of the accused's guilt before you convict him . . . I put it to you clearer, that you must be so reasonably sure—that means you must not be absolutely positive so that there can be no doubt. You must apply your common sense to this matter." At the end of the summing-up the recorder said: " If you have any reasonable doubt about it, if you believe their story, if you think they did not know it was stolen then, of course. you will find them not guilty." On appeal to the Court of Criminal Appeal:

Held, allowing the appeals, that it was not right to direct a jury that they must be reasonably sure. That imported a standard of certainty below that which was conveyed by the now established direction that the jury must be satisfied so that they felt sure. The recorder's final direction undoubtedly did something to repair the earlier misdirection but, as had been said over and over again, it was of crucial importance that the direction as to the burden of proof and as to the standard of proof should be given in clear terms. Accordingly, the appeals would be allowed. [H. P.]

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[22] For the appellant: *H. T. Buckee* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *M. J. P. McNair* (instructed by the Town Clerk, Brighton).

Commentary. In *R.* v. *Jones* [1961] Crim.L.R. 322, the Court of Criminal Appeal expressed its disapproval of the phrase "reasonably sure" as a description of the standard of proof required in a criminal case, though in that case the court was able to hold that the defect was cured by the effect of the summing-up as a whole.

Still further cases in which convictions have had to be quashed because of misdirection as to the standard of proof are *R.* v. *Hadjimitsis*, below, p. 563, and *R.* v. *Manning*, below. As has already been pointed out in this *Review* ([1961] CrimL.R. 282) the rules relating to the direction on the burden of proof are both fundamentally important and extremely simple, yet they seem to be broken regularly. Of course, the number of reported cases of misdirection is only a tiny proportion of the vast number of criminal cases tried, but is it excusable that they should occur at all?

Interjections of a prejudicial nature—summing up—no direction as to degree of "satisfaction" required—Criminal Appeal Act, 1907, proviso to s. 4 (1)—second trial

R. v. Manning

Court of Criminal Appeal: Lords Parker C.J., Finnemore and Howard JJ.: May 19, 1961.[23]

M. was convicted at borough sessions of driving under the influence of drink. He appealed to the Court of Criminal Appeal against his conviction on two main grounds, namely, (i) that certain interjections and remarks of the recorder might have prejudiced M. by leading the jury to believe that he had previous convictions (as was the fact), and (ii) that the recorder failed to direct the jury as to the degree of proof required. The interjections complained of were principally as follows. When counsel for the defence was cross-examining the doctor, he (counsel) put the question: "It is quite a common test, or used to be a common test some medical practitioners employed, to pick up coins or put things in a pocket." The recorder then interjected: "If we go on elaborating on a defendant's previous experience in these matters the jury might draw an inference from them which would not be very helpful to your client." Later, when M. gave evidence, the recorder asked him a series of questions including: " You have had a lot of experience with business, have you not, dealing with crime? " to which M. replied: " I have not had dealing with crime but, unfortunately, I have been in one or two episodes against me."

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[23] For the appellant: *Peter Rawlinson, Q.C., I. S. Hill* (instructed by Stokes; Nevill-Smith & Grubb, Portsmouth). For the Crown: *A. John Jenkins* (instructed by the Town Clerk, Portsmouth).

Held, allowing the appeal, that as to the recorder's first interjection, it was clear that there was a misapprehension as to what counsel for the defence was saying. The recorder thought that counsel was dealing with M.'s previous experience and the interjection might well have conveyed to the jury the impression that such questions might produce evidence of M.'s previous experience of crime. As to the recorder's second interjection, the recorder no doubt had in mind the fact that M. was the proprietor of an amusement park and, as such, had come across cases of crime not committed by him but by other people. However, the question and subsequent cross-examination certainly suggested and conveyed to the jury that M. himself had had previous experience of crime. It was unnecessary to decide whether these two interjections alone would have justified this court in setting aside the conviction in view of the direction on the burden of proof. The recorder quite rightly told the jury that the burden of proof was always on the prosecution and that it was never for the prisoner to prove his innocence. Nevertheless, in dealing with what amounted to proof he throughout used the words " You must be satisfied " without indicating what degree of satisfaction was required in a criminal case. Taking these two matters together it would be unsafe to allow the conviction to stand.

There had in this case been a previous trial at which the jury disagreed. It seemed to this court that there could be no question of applying the proviso to section 4 (1) of the Criminal Appeal Act, 1907 (on the ground that there had been no substantial miscarriage of justice), because this was the second trial. [H. P.]

Commentary. The misdirection on the standard of proof was the same as in *R.* v. *Hadjimitsis*, below, p. 563. See also *R.* v. *Head and Warrener*, above, p. 560 and [1961] Crim.L.R. 282.

The ground on which the court declined to apply the proviso—that the accused had already been through two trials—is interesting. One of the objections sometimes raised to giving the court power to order a new trial is that this might lead a man being tried not merely twice but three or four times—as has occurred in America. The implication of the present decision is that, if the court had such power, it would not normally be exercised more than once in respect of a particular charge.

Summing up—burden of proof—no direction as to degree of "satisfaction" required

R. v. Hadjimitsis

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Salmon JJ.: June 6, 1961; *The Times*, June 7, 1961.[24]

H. was convicted at the Central Criminal Court of robbery while armed. The main witness for the prosecution was one A., who said in evidence at the trial that she had been tied up and robbed by a masked man with a pistol; that during the course of the struggle she had pulled away the mask and was able to recognise H. as her assailant. The defence was an alibi and an allegation that A.'s story was false. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that the case was one which called for a very careful summing up. The trial judge had quite properly directed the jury that it was for the prosecution to prove the appellant guilty and not for the appellant to prove his innocence. However, there was no statement in the summing-up as to the degree of proof required, except: "Have the Crown proved to your satisfaction that it is so?" It would have been much better for the judge to have said what degree of satisfaction was required; for example, that the jury must be satisfied beyond reasonable doubt or so that they were sure the prisoner was guilty. This court felt that the conviction had to be quashed. [H. P.]

Commentary. See *R.* v. *Head and Warrener,* above p. 560, *R.* v. *Manning,* above, p. 561, and [1961] Crim.L.R. 282.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Burglary

In R. *v.* LOWE the court (Ashworth, Salmon and Elwes JJ.: June 16, 1961) reduced a sentence of eight years' preventive detention for burglary and other offences to one of four years' imprisonment on the ground that the appellant was only just thirty years of age when sentenced and that the offences themselves had been committed before he had attained that age. Ashworth J., giving judgment, said that there could be no doubt at all but that L. was a persistent criminal. If he had been older this court would have been disinclined to interfere with the sentence. In the circumstances, however, a sentence of preventive detention was not called for.

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[24] For the appellant: *Bernard Gillis, Q.C.*, *Marilyn Wigoder* (instructed by Mr. Alfred Halberstam). For the Crown: *J. H. Buzzard* (instructed by the Solicitor, Metropolitan Police).

Housebreaking

In R. *v.* HOPWOOD the court (Ashworth, Salmon and Elwes JJ.: June 16, 1961) reduced a sentence of three years' corrective training to one of two years' corrective training in the case of a man of twenty-three years of age who had not previously been to prison. The Prison Commissioners had reported that H. had reached a stage where he was heading for a life of crime; that special character training could help him if he co-operated; and that he was suitable for corrective training. Ashworth J., giving judgment, said that the sentencing court might well not have been aware of a recent decision of this court which held, contrary to the previous practice, that a sentence of two years' (rather than three years') corrective training could in certain cases be regarded as sufficient.[1] In view of the fact that H. had never previously been to prison, the appropriate sentence in this case was one of two years' corrective training.

Larceny

In R. *v.* KELLY the court (Ashworth, Salmon and Elwes JJ.: May 30, 1961) reduced a sentence of five years' imprisonment for larceny to one of three years' imprisonment. Salmon J., giving judgment, referred to the following remarks of the chairman of the sentencing court. " You brought allegations against two very respectable police officers who gave their evidence in the fairest way imaginable and the jury very properly commented on the forthright way in which the officers gave their evidence. I entirely agree with what the jury feel about that. You cannot behave like this without increasing your sentence, and this treatment of the officers has been taken into account." This court wished to state emphatically that it was wholly wrong to take that matter into consideration for the purpose of increasing the sentence.

In R. *v.* MILLER the court (Ashworth, Salmon and Elwes JJ.: June 5, 1961) reduced a sentence of eight years' preventive detention for larceny and other offences to one of eighteen months' imprisonment (consecutive to a previous sentence) in the case of a man of thirty-two years of age who only just qualified for preventive detention. Ashworth J., giving judgment, said that M.'s record was by no means as unsatisfactory as that of many offenders who came before this court. Indeed, apart from one motoring offence dealt with summarily in 1956, he had only two convictions for serious crime. Therefore, M. only just qualified for preventive detention and was only thirty-two years of age. It seemed to this court that M.'s record was not such as to demand a long term of imprisonment for the protection of the public and that in the circumstances, preventive detention was inappropriate.

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[1] [1961] Crim.L.R. 249.

Road traffic offence

In R. *v*. SMITH the court (Ashworth, Salmon and Elwes J.J.: [1961] 1 W.L.R. 1046) set aside a sentence of eight years' preventive detention imposed for a road traffic offence. S. had pleaded guilty to driving whilst under the influence of drink and to driving whilst disqualified and was sentenced to eight years' preventive detention for the first offence and to six months' imprisonment for the second offence. Ashworth J., giving judgment, said that S. had an appalling record, showing a deliberate and persistent disregard of the order of the court disqualifying him from driving and including no less than three convictions for driving under the influence of drink. It had been urged on behalf of S. that preventive detention was inappropriate for this class of offence. It was no doubt true that the occasions when such a sentence would be appropriate were exceedingly rare but there was in the opinion of this court, no sound reason for excluding the possibility of a sentence of preventive detention for offences such as those to which S. had pleaded guilty. In the present case, S.'s longest previous sentence was one of sixteen months' imprisonment and this court felt that the time had not yet been reached for preventive detention. The appropriate sentence was one of two years' imprisonment to run consecutively to the sentence of six months' imprisonment.

Shopbreaking

In R. *v*. BYRNE the court (Ashworth, Salmon and Elwes JJ.: May 30, 1961) reduced a sentence of seven years' imprisonment to one of four years' imprisonment. B. had pleaded guilty to shopbreaking and to three cases of housebreaking and larceny. Salmon J., giving judgment, said that B. was only twenty-eight years of age with a very bad record. The sentencing court had regretted that it had not the power to sentence B. to preventive detention, and had imposed a sentence of similar length. This court, however, felt that the sentence of seven years' imprisonment was too severe for the offences in question, serious though they were, and was wrong in principle. The appropriate sentence was one of four years' imprisonment.

In R. *v.* HORN the court (Lord Parker C.J., Ashworth and Salmon JJ.: June 13, 1961) varied a sentence of seven years' preventive detention for attempted shopbreaking to one of eighteen months' imprisonment (consecutive to a sentence of eighteen months' imprisonment for assault with intent to resist arrest) in the case of a man of thirty-eight years of age with a bad record. Salmon J., giving judgment, said that the sentencing court had not given sufficient weight to the fact that H. had kept out of trouble for five years from 1955 to 1960. The sentence of preventive detention was wrong in principle because that sentence was reserved for people who had shown clearly that they intended to do nothing else except prey on society.

Uttering threatening letters

In R. *v.* RAMSAY the court (Ashworth, Salmon and Elwes JJ.: May 30, 1961) varied a sentence of five years' imprisonment for uttering threatening letters to one of borstal training. Ashworth J., giving judgment said, that R. was only nineteen years of age and that a sentence of five years' imprisonment at that age was to be regarded as something quite exceptional. There had to be a good reason to justify such a sentence. It was true that the threatening letters in the present case might well have caused the recipients to be fearful for their own safety; they included threats to kill and demanded money. R. had not been to prison before, having had only one previous conviction, but his character was described as arrogant, insolent, disobedient; he was a poor workman and a bad timekeeper. The sentence of five years was too severe and, in any event, imprisonment was inappropriate. R. was in urgent need of some form of discipline and training and, accordingly, would go to borstal training.

Acts and Orders *

Agriculture

Sellers of mixtures of seeds are now permitted to declare the proportions by weight of each constituent of the mixture without expressing those proportions in terms of percentages as would be necessary to comply with the Seeds Regulations, 1961 (S.I. No. 212). Operative August 1, 1961. SEEDS MIXTURES GENERAL LICENCE, 1961 (S.I. No. 1086) (3d.).

See also under SCOTLAND, below, p. 571.

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* Prepared by F. Maurice Drake, Barrister-at-Law.

Animals

The Importation of Hay and Straw Order, 1955 (S.I. 1955, No. 370) and subsequent amending Orders are consolidated with further amendments. Dried grass is now expressly included along with hay and straw as an article that may not be landed in Great Britain from any ship or aircraft if it is brought from any country other than the countries specified in the Schedule to the Order, but dried grass imported under a licence issued by the Minister of Agriculture, Fisheries and Food or the Secretary of State for Scotland is exempted from this prohibition. Operative June 1, 1961: IMPORTATION OF HAY, STRAW AND DRIED GRASS ORDER, 1961 (S.I. No. 946) (3d.).

For penalties for contraventions, see sections 78–80 of the Diseases of Animals Act, 1950.

The Slaughter of Animals (Prevention of Cruelty) Regulations, 1958 (S.I. 1958, No. 2166) and the Slaughterhouses (Hygiene) Regulations, 1958 (S.I. 1958, No. 2168) which otherwise came into operation on January 1, 1959, provided for the deferment of certain requirements relating to the construction, layout and equipment of existing slaughterhouses until such later dates as the Minister might appoint. These Orders specify the date (July 1, 1961) on which these provisions shall come into operation in certain local authority areas. Operative July 1, 1961. SLAUGHTER OF ANIMALS (PREVENTION OF CRUELTY) REGULATIONS (APPOINTED DAY—NO. 2) ORDER, 1961 (S.I. No. 1020) (3d.); SLAUGHTERHOUSES (HYGIENE) REGULATIONS (APPOINTED DAY—NO. 2) ORDER, 1961 (S.I. No. 1019) (3d.).

Wild Birds

Havergate Island in the county of East Suffolk is made a bird sanctuary. Entry into the area is prohibited without the written authority of the Royal Society for the Protection of Birds or the Nature Conservancy. The actions specified in the Order are made specified offences against the Protection of Birds Act, 1954, and will be punishable by the special penalty provided in that Act for the more serious offences thereunder. Operative July 1, 1961. WILD BIRDS (HAVERGATE ISLAND SANCTUARY) ORDER, 1961 (S.I. No. 1077) (3d.).

For penalties for contraventions, see section 12 (2) of the Protection of Birds Act, 1954.

Courts-Martial

The Courts-Martial Appeal Rules, 1952 (S.I. 1952, No. 194) are amended (a) to prescribe the procedure of the Courts-Martial

Appeal Court in proceedings preliminary or incidental to an appeal from that court to the House of Lords under sections 10 and 13 of the Administration of Justice Act, 1960. Rule 6 provides that an application to the Courts-Martial Appeal Court for leave to appeal, to extend the time for appealing or for legal aid, or for leave to be present at the hearing of such an application, should, unless made orally at the hearing before the court, be made, with appropriate modifications, in the form prescribed for making similar applications to the Court of Criminal Appeal; (b) to prescribe the procedure to be followed in the case of prisoners of war who have a protecting power within the meaning of the Geneva Conventions Act, 1957, and who have been convicted by a prisoner of war court-martial (Rules 3, 4, 5 and (9)); and (c) to adapt the provisions relating to the restitution of stolen property to take account of the coming into operation of the Naval Discipline Act, 1957, and the Administration of Justice Act, 1960 (Rule 8). The Courts-Martial Appeal (Amendment) Rules, 1954 and 1955, are revoked, but the 1954 Rules are substantially re-enacted in Rule 4 of these Rules. Operative July 1, 1961. COURTS-MARTIAL APPEAL (AMENDMENT) RULES, 1961 (S.I. No. 1015) (4d.).

Criminal Procedure

OATHS ACT, 1961 (9 & 10 Eliz. 2, c. 21). The Oaths Act, 1888 (51 & 52 Vict. c. 46), in certain cases permits persons objecting to being sworn to make a solemn affirmation instead. These provisions are now extended so as to apply in relation to a person to whom it is not reasonably practicable, without inconvenience or delay, to administer an oath in the manner appropriate to his religious belief. In such cases the person may be required to affirm as well as merely permitted to do so. Similar provisions apply to courts-martial under the Army Act, 1955 (s. 102), the Air Force Act, 1955 (s. 102), and the Naval Discipline Act, 1957 (s. 60); and in these cases a person may now also be required to affirm where it is not reasonably practicable to affirm in the manner appropriate to his religious belief, " reasonably practicable " meaning " reasonably practicable without inconvenience or delay." The Act became operative June 18, 1961.

Diplomatic Immunity

The European Free Trade Association was established by the Convention signed on January 4, 1960, which was ratified by Her Majesty's Government and entered into force on May 3, 1960. This Order confers certain immunities and privileges upon the

Association, its representatives, officers and experts employed on missions, in accordance with the Protocol on Legal Capacity, Privileges and Immunities of EFTA signed at Geneva on July 28, 1960 (Cmnd. 1194). It will become operative on the date when the Protocol comes into force with respect to the United Kingdom. EUROPEAN FREE TRADE ASSOCIATION (IMMUNITIES AND PRIVILEGES) ORDER, 1961 (S.I. No. 1000) (3d.).

Exchange Control

The list of banks and other persons authorised to deal in gold and foreign currency, and the list of authorised depositaries for the deposit of securities under the Exchange Control Act, 1947, are revised. Operative June 1, 1961. EXCHANGE CONTROL (AUTHORISED DEALERS AND DEPOSITARIES) (AMENDMENT) (NO. 2) ORDER, 1961 (S.I. No. 928) (2d.).

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947.

Food and Drugs

See also under Animals, above, for the bringing into effect as from July 1, 1961, in certain areas of certain deferred provisions of the Slaughterhouses (Hygiene) Regulations, 1958 (S.I. 1958, No. 2168).

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 956 (Hornsey) (2d.); 1051 (Southwark) (3d.).

The following Orders have been made prohibiting waiting: S.I. Nos. 930 (the East of London to Southend Trunk Road, A.127) (3d.); 1062 (Harlow) (2d.).

The following Orders have been made imposing certain restrictions on driving over certain roads: S.I. Nos. 1052 (Banstead) (3d.); 1063 (Twickenham) (3d.).

A speed limit of 15 m.p.h. is imposed on the driving of motor-vehicles on Granby Road, Northfleet, from June 13, 1961. LONDON TRAFFIC (15 M.P.H. SPEED LIMIT) (NORTHFLEET) REGULATIONS, 1961 (S.I. No. 1064) (2d.).

For penalties for contraventions, see section 4 (1) of the Road Traffic Act, 1960.

The following Orders have been made imposing a speed limit of 40 m.p.h. on certain roads: S.I. Nos. 913 (London–Great Yarmouth Trunk Road (A.12) in Romford) (3d.); 1053 (Bullsmoor Lane (A.105) Enfield) (2d.).

The principal Orders (S.I. 1959, No. 2104 and S.I. 1960, No. 1525), as amended, are further amended (a) by altering the parking-meter areas in certain places; (b) by applying the principal Orders to the new and redesignated parking places within the City specified in the Schedules to the Orders; and (c) by extending the circumstances in which a traffic warden may remove a vehicle from a parking place. Operative June 26, 1961. PARKING PLACES (WESTMINSTER) (No. 1, 1959) and (No. 1, 1960) (AMENDMENT No. 2) ORDERS, 1961 (S.I. 1038 (4d.), and 1039 (3d.)).

Medicine

The substances specified in regulation 2 are brought within the scope of Part II of the Therapeutic Substances Act, 1956 (which controls the sale and supply of certain therapeutic substances). Operative July 3, 1961. THERAPEUTIC SUBSTANCES (CONTROL OF SALE AND SUPPLY) REGULATIONS, 1961 (S.I. No. 1066) (3d.).

For penalties for contraventions, see section 12 of the Therapeutic Substances Act, 1956.

Merchant Shipping

The Republic of Uruguay has accepted the Safety Convention and a declaration is now made to that effect. Operative June 6, 1961. MERCHANT SHIPPING (SAFETY CONVENTION) (REPUBLIC OF URUGUAY) ORDER, 1961 (S.I. No. 1003) (2d.).

A declaration is made recognising that Poland has accepted the International Convention for the Prevention of Pollution of the Sea by Oil. Operative June 2, 1961. OIL IN NAVIGABLE WATERS (CONVENTION COUNTRIES) (POLAND) ORDER, 1961 (S.I. No. 1008) (2d.).

Various amendments are made in the scales of medicines and medical stores required to be kept in merchant ships and fishing boats, as set out in the Schedule to the principal Orders (S.I. 1953, No. 998 as amended, and S.I. 1954, No. 1954). Both operative August 1, 1961. MERCHANT SHIPPING MEDICAL SCALES (AMENDMENT) ORDER, 1961 (S.I. No. 1045) (6d.), and (FISHING BOATS) (AMENDMENT) ORDER, 1961 (S.I. No. 1046) (3d.).

For penalties for contraventions, see section 200 of the Merchant Shipping Act, 1894.

Offensive Weapons

RESTRICTION OF OFFENSIVE WEAPONS ACT, 1961 (9 & 10 Eliz. 2, c. 22). This Act amends the Restriction of Offensive Weapons Act, 1959, s. 1 (1), by making it an offence to expose for sale or to have in possession for the purposes of sale or hire a flick knife or other dangerous weapon; and thus in effect overrules the decision in *Fisher* v. *Bell* [1961] Crim.L.R. 180. Section 2 prohibits the importation of flick knives and other knives described in section 1 (1) of the 1959 Act into Northern Ireland. The Act extends to Scotland but not, save for section 2, to Northern Ireland. Operative June 18, 1961.

For penalties for contraventions, see section 1 of the Restriction of Offensive Weapons Act, 1959.

Opticians

Certain classes of persons training as ophthalmic opticians are exempted from the provision in section 20 (1) of the Opticians Act, 1958, that a person who is not a registered medical practitioner or registered ophthalmic optician shall not test the sight of another person. Operative June 1, 1961. GENERAL OPTICAL COUNCIL (RULES ON THE TESTING OF SIGHT BY PERSONS TRAINING AS OPTHALMIC OPTICIANS) ORDER OF COUNCIL, 1961 (S.I. No. 943) (3d.).

See also under SCOTLAND, below.

Probation

The 1960 Rules (S.I. 1960, No. 717) are amended by increasing the salaries of temporary probation officers with effect from August 1, 1960. PROBATION (CONDITIONS OF SERVICE) RULES, 1961 (S.I. No. 944) (2d.).

Scotland

The National Health Service (Qualifications for Supplementary Opthalmic Services) (Scotland) Regulations, 1958 (S.I. 1958, No. 2048), are amended by prescribing that the qualifications for opthalmic opticians or dispensing opticians or bodies corporate carrying on business as opticians, to provide supplementary opthalmic services, shall be inclusion in the registers or in the list maintained by the General Optical Council under the Opticians Act, 1958. Operative June 1, 1961. NATIONAL HEALTH SERVICE (QUALIFICATIONS FOR SUPPLEMENTARY OPTHALMIC SERVICES) (SCOTLAND) AMENDMENT REGULATIONS, 1961 (S.I. No. 973) (3d.).

July 14, 1961, is appointed as the day on which, as respects Scotland, the repeal of the Chaff-Cutting Machines (Accidents) Act, 1897, takes effect. Corresponding provisions contained in the Agriculture (Stationary Machinery) Regulations, 1959 (S.I. 1959, No. 1216) made under the provisions of the Agriculture (Safety, Health and Welfare Provisions) Act, 1956, take effect on the same day. REPEAL OF THE CHAFF-CUTTING MACHINES (ACCIDENTS) ACT, 1897 (SCOTLAND) ORDER, 1961 (S.I. No. 1069) (2d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The question of Readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

84. *Taking and driving away—whether offender would be covered by insurance*

If a person takes a motor-vehicle without the consent of the owner could his use of that vehicle possibly be covered by his own insurance, or, say, an insurance held by an employer, in the case of an employee taking a vehicle from an employer.

I hold the view that as the taking, etc., is illegal the insurance cover would not apply, but I believe there is case law on the subject, but I cannot find it. [C. S. L.]

ANSWER

Where a person takes another's vehicle without the owner's consent and is in possession of a motor insurance of his own which covers him to drive any vehicle of that type not belonging to him, then, provided that there is no limitation in his policy about getting the consent of the owner of that other vehicle, I am of the opinion that there would be no offence under section 201 of the Road Traffic Act, 1960 (see *Police* v. *Bishop* [1956] Crim.L.R. 569, the commentary at [1956] Crim.L.R. 570 and a decision of Dorset Quarter Sessions noted at 124 J.P.N. 109).

In order to sustain a conviction against an employee under section 217 of the 1960 Act it would have to be shown that he took the vehicle without his employer's permission. Since nearly all policies of insurance held by commercial undertakers only cover their employees when driving with the employer's permission there would, in such a case, be no cover available under the employer's policy. [K. C. C.]

Books and Periodicals

Book reviews:

Essays in Criminal Science. Edited and introduced by Gerhard O. W. Mueller. Vol. I of the Publications of the Comparative Criminal Law Project, New York University. London: Sweet & Maxwell, Ltd. 1961. xvi and 460 pp. 70s. net.

This book is presented as a *Festschrift*, a fiftieth anniversary tribute to the *Journal of Criminal Law, Criminology and Police Science* of Northwestern University, Chicago, and to Dr. R. H. Gault ("The Nestor of American Criminology") its Editor-in-Chief. As a motto or keynote for the whole, there stands a short passage from Dr. Gault's own pen: "Criminals are human beings much like the rest of us. . . . They think, learn, and forget as we do; in respect to their physical make-up they resemble our neighbours in our city block . . ."; and Dr. Mueller, the Editor, contributes both a Foreword and an Introduction, referring in the former to "the half-century which saw Dr. Gault on the top of this Journal's masthead," a happy variant of the Casabianca situation.

The *Festschrift* itself consists of seventeen essays arranged in four Parts. The first Part, "The Quest for New Ideas," includes a repetitious but stimulating essay, "'The Rule of Law' in Criminal Justice" by Dr. Helen Silving, Professor of the University of Puerto Rico and "the First Lady of American Criminology." Dr. Silving is concerned with what she sees as a revolution in penal philosophy, a transformation of criminal justice from a judicial process into an administrative process; and she has some suggestive comments upon the "dual-track" system (*Zweispurigkeit*)—"punishments" for punitive ends, "measures" for socially protective purposes—which has found favour in Germany and other civil law countries.

In the second Part, "The Science of Criminal Law: General Principles," Dr. Mueller makes his third appearance with a study of causation in the criminal law under both common law and civil law systems. He cites the opinions of Dr. Glanville Williams, including those in his article "Causation in Homicide" in this *Review* in 1957; but some of the later passages the present writer found hard going, especially those introducing algebra. The third Part is distinguished by contributions from Dr. Norval Morris, who is interesting upon the application of the *M'Naghten* Rules by Australian courts, and throws fresh light upon *Att.-Gen. for South Australia* v. *Brown* (1960) 44 Cr.App.R. 100: from Professor J. Ll. J. Edwards upon the concept of diminished responsibility in English law, in which he adverts incidentally to the proposal to substitute for the jury a panel of medical experts in deciding the issue of insanity, anathematised by Lord Hewart in *R.* v. *Thorne* (1925) 18 Cr.App.R. 117, but revived by Dr. Glanville Williams in 1954 and more recently still by Mr. Blom-Cooper and other correspondents in *The Times*: and from Dr. Williams himself upon Automatism. One would like to have Dr. Williams' comments upon the subsequent case of Sgt. Boshears, and other instances of alleged somnambulistic homicide assembled by Dr. Podolsky in *Medicine, Science and the Law* for April,

1961. Part Four contains welcome studies of law reform in France, Germany, Japan and the Soviet Union; the observations of Dr. Ginsburgs and Mr. George Mason upon Soviet juridico-political practice gain added point from Russia's recent extension of the death penalty.

Perhaps the most engaging contribution, however, is that by Professor von Hentig upon "The Problem of Returning to the Scene of the Crime." "It happens often," he writes, "that the murderer has to struggle with the victim. Pieces of clothing are torn off and strewn around. A tie is left behind, buttons give way. Not rarely hats are lost. . . . Above all, sex murderers, flurried to a high degree, fighting a desperate battle, undressing partly, are likely to lose handkerchiefs, cuff links, keys, even the vest." These hazards attendant upon a life of crime should, one feels, be made more widely known.

The lack of any index, table of cases, or bibliography (other than that provided by Professor Ferracuti for his own paper) detracts somewhat from the usefulness of a book which may otherwise be read with pleasure and profit.

M. W. PALMER.

Intent to Kill. Transcript of papers given by E. J. Griew and J. E. Hall Williams at a symposium of the Haldane Society on November 22, 1960. Obtainable from the Hon. Sec. of the Society, Benedict Birnberg, Esq., Flat 3, 24 Morden Road, Blackheath, London, S.E.3. 8 pp. 2s. 6d. net.

These two papers were given under the title "The Doctrine of Intent in Criminal Law—with reference to *D.P.P.* v. *Smith*." Mr. Griew needs no introduction to readers of this *Review*. He carefully analyses the decision of the House of Lords in the *Smith* case and sees it as an unwelcome addition to the elements of irrationality and inconsistency in our criminal law. In the second paper, Mr. Hall Williams gives us an interesting view of the doctrine of intent. He maintains that there are two factors to be considered—first, the subjective intention of the accused, and secondly, the objective determination of his liability for the consequences of his act.

With the time for the review of the working of the Homicide Act, 1957, drawing nearer, the decision in *D.P.P.* v. *Smith* will continue to arouse comment from academic and practising lawyers. These papers make a valuable contribution to the debate and deserve to be widely read.

G. M. W.

Oxford Essays in Jurisprudence. Edited by A. G. Guest. Clarendon Press: Oxford University. 1961. 292 pp. (including index). 25s.

This is a collection of essays on ten widely diverse topics of jurisprudence by members of the Faculty of Law at Oxford. The production of the volume is of the high standard associated with the O.U.P. The editor has been responsible merely for arranging production, so perhaps the authors are themselves at fault if their essays have not been brought up to date for incorporation in the volume: superseded editions of some textbooks are referred to (Street, at p. 23; Archbold, at p. 27; Hanbury, at p. 118); the failure to quote *D.P.P.* v. *Smith* rather than *R.* v. *Ward* (p. 31) dates the essay concerned.

The criminal lawyer will be interested most in the two essays first printed. Mr. P. J. Fitzgerald, in "Voluntary and Involuntary Acts," examines the notions of "act" and "involuntary action" in the context of the propositions that the law normally requires an act as a condition of responsibility and that exemption tends to be accorded to involuntary conduct. The approach and the conclusions are largely empirical: how is the word "act" in fact used by lawyers? what types of behaviour are recognised as involuntary? General definitions turn out to be unsatisfactory. This should surely cause no surprise. The criminal law, for instance, is primarily a collection of particular propositions as to different types of liability—the definitions, minutely analysed, of individual crimes. The content of each proposition owes more to the history and function of the crime concerned than to any general theory of liability. That there can validly be said to be a general requirement of an *actus reus* is as irrelevant as the statement of that requirement is commonly unhelpful. The point is scarcely less true of *mens rea*; and the same observations apply equally to the law of torts. The familiar textbook and teaching rubric "General Principles of Liability" has in our system something of the appearance of wishful thinking.

"Negligence, *Mens Rea* and Criminal Responsibility" is the title of an essay by Professor Hart which is primarily a critique of Mr. Turner's famous theory of the mental element in crimes at common law. The argument is too closely conducted to be summarised with justice. Suffice it to say that Professor Hart demonstrates that negligence is a form of *mens rea* and not an element in strict or absolute liability, and that the idea of "gross negligence" is not nonsensical (negligence consists in a "failure to take precautions against harm by examining the situation" in which the act or omission occurs; it is gross "if the precautions to be taken against harm are very simple, such as persons who are but poorly endowed with physical and mental capacities can easily take"). This excellent essay is perhaps, after all, only triflingly marred by a stylistic horror near its beginning—the use of "It is, however, the case that" for "But"—the taste of which lingered in this reviewer's mouth until almost the last line.

E. J. G.

Books received:

Interrogation for Investigators. By Richard O. Arther and Rudolph R. Caputo. 1961. New York: C. Copp and Associates. x and 232 pp. (including index). $3.88 net.

The Two Stranglers of Rillington Place. By Rupert Furneaux. 1961. London: Panther Books, Hamilton & Co. (Stafford), Ltd. 185 pp. 2s. 6d. net.

Battle in Bossenden Wood. By P. G. Rogers. 1961. London: Oxford University Press. 256 pp. 25s. net.

Guilty But Insane. By G. W. Keeton. 1961. London: Macdonald & Co. (Publishers), Ltd. 208 pp. (including index). 21s. net.

The Concept of Law. By H. L. A. Hart. 1961. London: Clarendon Press: Oxford University Press. 263 pp. (including index). 21s. net.

Murdered on Duty. By Belton Cobb. 1961. London: W. H. Allen & Co., Ltd. 208 pp. (including indices). 18s. net.

The Railway Policeman. By J. R. Whitbread. 1961. London: George G. Harrap & Co., Ltd. 269 pp. (including index). 18s. net.

Moriarty's Police Law. 16th ed. By W. J. Williams. 1961. Butterworth & Co. (Publishers), Ltd. xx and 640 pp. (including index). 16s. 6d. net.

Readers' digest:

Diplomatic Immunity: Waiver of diplomatic immunity (based on *R.* v. *Madan*: [1961] Crim.L.R. 253): 111 *Law Journal* 403.

Euthanasia: Voluntary mercy deaths—socio-legal aspects of euthanasia: 8 *Journal of Forensic Medicine* 57.

Evidence: Cross-examination on character: 232 *Law Times* 8 ("Criminal Law Topics").

Food and Drugs: Some recent public health cases: 125 *Justice of the Peace* 379.

Forgery: Preparation of important documents: 231 *Law Times* 367 ("The Conveyancer").

Larceny: Intent to steal: 69 *Police Review* 454 and 472.

Larceny: *Historical*: Predatory crime: 125 *Justice of the Peace* 409.

Magistrates' Courts: A security to persons who are accused (a note on *Dryden* v. *Johnson* and *Cripps* v. *Forrest*, above, pp. 551 and 548): 125 *Justice of the Peace* 361.

Magistrates' Courts: Choice of tribunal: 69 *Police Review* 500.

Road Traffic: Danger! Red flag at work: 105 *Solicitors' Journal* 559.

Road Traffic: Unreasonable doubt (on dangerous driving) 125 *Justice of the Peace* 395.

Sentence: Training for citizenship (on the Boston Training Centre, U.S.A.): 125 *Justice of the Peace* 378.

Weights and Measures: *Offensive Weapons*: Some obiter: 125 *Justice of the Peace* 362.

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1961

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Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

September 1961

Public opinion and crime

As readers will recall, this was the subject of our special issue in July. It was also the title of an address by Professor Leon Radzinowicz to the British Academy of Forensic Sciences on July 15. He said that today the public was worried and disappointed that increased prosperity had not brought about a decrease in crime, but on the contrary " seems to have created an environment which in some strange way tends to encourage the advance of lawlessness." The optimism of 1948, when the increase was thought to be a transient, had disappeared. The upward trend showed no signs of abating, and we would be fortunate if the 1960 figures showed a rise of no more than 10 per cent. In fact, the rise, according to the recently published figures, is 10.1 per cent.).

Three main trends in public opinion were discernible. The public tends to exaggerate the increase, which, although real, is partly due to the greater tendency to report crime and to the greater efficiency in the keeping of police records. The panic induced by some persons who sway public opinion was unjustified as, for example, the chances of being robbed in London are less than three to one hundred thousand.

Secondly, there is a movement, which generally accompanies an increase in crime, to demand greater severity. The reintroduction of corporal punishment, despite expert opinion as to its inefficiency,[1] is desired by a greater number of people. Professor Radzinowicz was against any provision to equate life sentences to the lifespan of the offender, but he recognised the right of society to be adequately protected and recommended the re-examination of the whole mode of enforcement of such sentences. He questioned whether the courts were making full use of their sentencing powers in general, and noted a considerable degree of inconsistency in this sphere. He also suggested a review of our system of fines in the light of changed economic conditions.

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[1] The most recent example is the Report of the Advisory Council on the Treatment of Offenders under the chairmanship of Barry J.

The third trend noted by Professor Radzinowicz was the public's notion of penal reform as something unrealistic and "soft." This was a dangerous misconception, and he stressed the continuing importance of putting into effect the whole of the Criminal Justice Act, 1948, and the programme outlined in the White Paper, "Penal Practice in a Changing Society."

Professor Radzinowicz concluded by pointing out that the increase in crime was not confined to England, and that the influence of criminal legislation and the penal system on it should not be overrated. There is no short cut to the solution.

Crime detection

During the course of his address, referred to above, Professor Radzinowicz said that the best way of preventing crime was to make detection certain. It is quite clear from the annual statistics that detection is by no means certain; in 1960, for example, only 44.4 per cent. of known cases were cleared up by the police. Perhaps the two most important factors are, first, a sufficient number of police and, secondly, their efficient use. As regards the first factor, it is discouraging to notice that, in addition to the Metropolitan and City of London Forces, six County and fifteen Borough Forces were deficient by more than 10 per cent. of their authorised establishment. Clearly, every effort should be made to increase the number of men of the right quality coming into the police service.

The use of scientific aids to assist the police forms the subject of some of the papers read at the British Academy of Forensic Sciences meeting in July. These papers dealt with the work of the doctor (Dr. Francis Camps spoke), the chemist (Dr. H. J. Walls), and three papers dealt with the work of the biologist (Dr. W. E. D. Evans on hairs, Dr. Barbara Dodd on stains, and Mr. A. H. Little on fibres). Mr. Frank Elmes spoke on the police officer and Mr. McLachlan of *The Times* on the citizen and the press. Whilst there are limits to the use than can be made of science, it is essential that the police should know when to call for expert evidence and where to get it.

Death by dangerous driving

As a prefix to the statistics of road traffic offences noted below [2] we observe that all cases of causing death by dangerous driving were dealt with by prosecution (431). In a recent case at Hampshire Assizes where the accused was found not guilty of this offence, Mr. Justice Stevenson said " There is a tendency to launch these prosecutions merely because a death occurs as a result of an accident without the authorities applying themselves as to whether the death was caused by dangerous driving. . . . I do think it is terribly important that these cases should be most carefully scrutinised before they are started and that people should not take the view that merely because there is a death there should be a prosecution." [3]

Police interrogation: right of solicitors to be present

The Council of the Law Society have received several inquiries from solicitors asking for guidance on the right of a solicitor to be present while his client is being interrogated by the police. A committee has been set up to consider the matter and to report.[4]

The Annual Reports for 1960

Criminal Statistics [5]

The number of indictable offences known to the police in 1960 rose by 10.1 per cent., an increase greater than that of 1959. However, the number of persons convicted of these offences rose only by 6.7 per cent., making the total of indictable offences cleared up only 44.4 per cent. of those known to the police, which is a lower percentage than in 1959.

Convictions of women rose more steeply than those for men, notably in the 17–21 age group where they rose by 20.8 per cent. Again there is a substantial increase in the number of young offenders between the ages of 17 and 21, but convictions of older men over 30 have dropped. There was a 6.8 per cent. increase in the number of convictions of men aged 21–30.

Among indictable offences known to the police, the number of murders was less than in 1959, but the numbers rose for offences against the person (12 per cent.), receiving (9 per cent.) and larceny (7 per cent.). The number of sexual offences dropped by 3 per cent. The number of persons convicted of non-indictable offences dropped, in particular convictions for prostitution offences fell by

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[2] Below, p. 580.

[3] *The Times*, July 12, 1961.

[4] *Law Society's Gazette*, Vol. 58, p. 504.

[5] Cmnd. 1437. Criminal Statistics, England and Wales, 1960.

78 per cent., no doubt largely due to the operation of the Street Offences Act, 1959. Revenue offences and convictions for drunkenness, however, rose.

Road Traffic Offences [6]

The number of motoring offences, and alleged motoring offences, brought to the attention of the police in 1960 dropped slightly, by 1.1 per cent.; the majority of them were prosecuted, 245,105 were dealt with by written warning, and 16,921 by the fixed penalty procedure.[7]

The number of persons convicted in magistrates' courts rose by 2.8 per cent., convictions for dangerous driving, driving under the influence of drink or drugs, and careless driving accounting for a large share of this increase.

More persons were imprisoned by both magistrates' and higher courts, and the amount of fines collected increased slightly. The number of cases dealt with by police warnings fell by 17.9 per cent.

Metropolitan Police [8]

While not attempting to summarise this report, which has been done in the *Police Review* and elsewhere, there are several points in it which will be of general interest to our readers. Two new branches created in 1960 were the Criminal Intelligence Section which obtains information about organised crime and the activities of persistent criminals, and the Stolen Motor Vehicles Investigation Branch. A Juvenile Liason Officers scheme was started at the invitation of the authorities in West Ham on the lines of the pioneer scheme operated by the Liverpool Police. On road traffic offenders, the Commissioner noted the considerable amount of time and work involved when offenders fail to pay the fixed penalty within the prescribed period, and intimated that unless the motoring public show a greater sense of respect for the law " Further short cuts will be inevitable." It may be that the authorities will be called to reconsider the introduction of " on the spot fines," a subject which was fully dealt with by Captain Popkess in an article in this *Review* last year.[9] The Commissioner also hoped for a change in the law whereby those who were disqualified from driving would be obliged to undergo a course of driving before they are permitted to regain their licence.

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[6] H.C. Paper No. 247.

[7] Road Traffic and Road Improvement Act, 1960, s. 1.

[8] Report of the Commissioner of Police of the Metropolis for 1960, Cmnd. 1440.

[9] " Should the Police Fine Offenders on the Spot?" [1960] Crim.L.R. 14.

Report of H.M. Inspectors of Constabulary for 1960 [10]

The year was worse for police recruiting than the previous year had been, while demands on the police for extra duties were in many areas heavier than in any recent year. A number of serious crimes made great inroads into the normal resources of the police forces concerned; some of the crimes were of special gravity and presented great difficulty while the offenders were being traced. It was found that in general the majority of members of the public were willing to help the police in their investigation, but a small proportion adopted an indifferent or unhelpful attitude.

The Report notes the further development of measures for the maintenance of the regional crime squads and record offices in the main centres of population, as experience justified the view that such regional co-operation was essential to investigations which cover wider areas than the single city, borough or county. In this issue we publish a letter on the subject of "The criminal and his car" in which our correspondent, while noting such trends as these towards the effective enforcement of the law, considers that something more is needed. His proposal may not meet with general approval but it merits consideration by those concerned.

Substantial savings in magisterial and police time and convenience, as well as for defendants, continued to be made by the operation of the Magistrates' Courts Act, 1957. The advanced course in criminology organised by Professor Radzinowicz at Cambridge under the auspices of the Institute of Criminology was attended by a number of police officers and also by magistrates, magistrates' clerks and representatives from the prison, probation, education, approved schools and social services. The course was by way of an experiment, and the verdict—"most successful." The Inspectors comment: "In our view an invaluable purpose is served when the many facets of crime and those who are involved in crime are examined jointly by practitioners and research workers in the many fields where crime and criminals are dealt with. Mutual appreciation of each other's work between the workers in each field makes for greater efficiency and is vital in tackling many current problems." (para. 66)

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[10] H.C. Paper No. 248.

Two Recent Acts

By Alec Samuels, B.A.
Barrister-at-Law, Lecturer in Law, University of Southampton

I. The Criminal Justice Act, 1961

Following a veritable welter of White Papers and Reports[1] and public disquiet and debate, the Government's proposals for dealing with the young offender are contained in the Criminal Justice Act, 1961, which is to come into operation on dates to be appointed by the Home Secretary (s. 44). A thorough overhaul of the Children and Young Persons Act, 1933, has been promised for the future.

Fundamentally the policy embodied in the Act is to abolish prison sentences for offenders under twenty-one, greatly to extend the provision of detention centres so that they should become the young offender's first taste of institutional treatment, and to place all young offenders, and some others, under compulsory after-care when they come out of penal institutions.

Prison

The minimum age at which any person may be sent to prison is raised from fifteen to seventeen (s. 2 (2)), although as a corollary the existing power to sentence children and young persons for very grave crimes to be detained for a specified period in such place and on such conditions as the Secretary of State may direct is extended to include any offence punishable in the case of an adult by a sentence of fourteen years or more.[2] Thus burglary and robbery are included, as well as homicide and wounding with intent to cause grievous bodily harm.

In practice not many persons under seventeen have been sentenced to imprisonment since nearly all such offenders are dealt with in juvenile courts.

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[1] (1) Penal Practice in a Changing Society, February 2, 1959 (Cmnd. 645).
(2) Inquiry into the Disturbances at Carlton Approved School, on 29th and 30th August, 1959, by Victor Durand, Q.C., January 1960 (Cmnd. 937).
(3) Report of the Advisory Council on the Treatment of Young Offenders, 1960 (Cmnd. 1213).
(4) Report of the Committee on Children and Young Persons (Ingleby Committee), October 1960 (Cmnd. 1191).
(5) Streatfeild Committee Report, February 1961 (Cmnd. 1259).

[2] Children and Young Persons Act, 1933, s. 53, as extended by the Criminal Justice Act, 1961, s. 2 (1).

• Prison sentences for persons aged 17–21 are to be progressively eliminated except for the very serious offences. Borstal training is now to be the standard form of training for most young offenders where the court is of opinion that detention for more than six months is expedient, and detention in a detention centre where less than six months is expedient. The court may sentence an offender aged 17–21 to prison for less than six months (s. 3 (1) (*a*)), although this power is to be abolished by Order in Council as more detention centres become available (s. 3 (5), proviso (*a*)), or for more than three years, but not for the intermediate period. There is an exception in the case of the young offender who already has a very bad record. Where the offender is already serving a sentence of imprisonment the section does not apply; where he has previously served a sentence of imprisonment of six months or more the minimum possible prison sentence is to be eighteen months instead of three years.

One of the main objects of the Act is to keep young offenders under twenty-one out of prison and to ensure that such offenders can be given the kind of training from which they are most likely to derive benefit. For short periods of detention there are the detention centres; for longer periods, over six months, offenders will undergo the indeterminate borstal sentence, if approved school is unsuitable. Imprisonment is to be restricted for young offenders to the limited range of cases where no other sentence is appropriate; and it is likely to be rare that a young offender will be sent to prison for three years, which is to become the minimum period available to the courts.

Borstal training

The minimum age for borstal training is lowered from sixteen to fifteen (s. 1 (1)). The period of training is shortened from a period of between nine months and three years to a new period of between six months (minimum) and two years (maximum). This follows a recommendation of the Advisory Council which was advised by the Prison Commissioners that experience showed that there were very few youths whose training could usefully be extended beyond two years, and that a shorter period would produce more co-operation from offenders, enable the tempo of the training to be accelerated, and present a challenge to the staffs of the institution.[3] The average period of detention is now about sixteen months.[4] It is hoped that the shorter, brisker and more demanding form of training, coupled with its indeterminate character, and followed by compulsory after-care, will act as a deterrent.[4] In the case of an offender under seventeen on the day of conviction the court must be of opinion that no other method of dealing with him is appropriate (s. 1 (2), proviso); this is an extension of the principle which has hitherto existed and continues to exist in respect of imprisoning young offenders under twenty-one.[5] All the law relating to borstal is conveniently printed in the Sixth Schedule.

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[3] Report of the Advisory Council on the Treatment of Young Offenders, 1960 (Cmnd. 1213), paras. 53–55.

[4] H.L. Deb., Vol. 230, col. 1059, May 1, 1961, Lord Kilmuir, L.C.

There is no new statutory requirement regarding reports to be submitted to the court to assist in determining sentence. The court must consider any report made by or on behalf of the Prison Commissioners (s. 1 (3)). It was urged that although the Prison Commissioners do their best in making their reports, yet they often lack the services of a qualified psychiatrist, and know little of the offender's background; and therefore there should be a duty on the court to procure reports from medical practitioners, social workers, headmasters and employers, so as to be able to form a more complete picture of the offender. Where an offender is brought before a juvenile court the appropriate local authority is statutorily obliged to "make such investigations and render available to the court such information as the home surroundings, school record, health, and character . . . as appear to them to be likely to assist the court."[6]

Detention centres

The age qualification for detention centres remains 14–21, but the period of detention ordered by the court may be from three to six months where the offender is at least seventeen, or is convictd at assizes or quarter sessions and the offence could be punishable by imprisonment for three months or more in the case of an adult (s. 4 (2) (*a*)). Otherwise the normal period remains at three months (s. 4 (2) (*b*)). Until short terms of imprisonment are abolished the court cannot send an offender to a detention centre unless notified by the Home Secretary that a vacancy in fact exists (s. 4 (3)). In the aggregate an offender may not be sent by the same court on the same occasion to a detention centre for more than six months (s. 7 (4)) and a consecutive order, which could arise where the offender was already serving a sentence in a detention centre, cannot cause the period of continuous detention to exceed nine months in all (s. 7 (5)). An offender can be sent for a second or subsequent time to a detention centre; but an offender who has previously been sentenced to imprisonment for not less than six months or to borstal training should not normally be sent to a detention centre unless there are special circumstances (s. 4 (4)). The wisdom of a second period in a detention centre has been challenged, since detention centres are most suitable for offenders undergoing their first taste of institutional treatment.[7] On the other hand, when short term prison sentences are abolished detention in a detention centre will remain as the only form of custodial treatment for short periods that is available to the courts. If a second period of detention were not possible then the courts would be obliged to consider approved schools or borstal training, with their considerably longer periods of detention. The offender would be "pushed up an escalator of punishment"[8] into a longer indeterminate sentence.

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[5] Criminal Justice Act, 1948, s. 17 (2).

[6] Children and Young Persons Act, 1933, s. 35, and the Summary Jurisdiction (Children and Young Persons Act) Rules, r. 11 (ii). See also the Magistrates' Courts Act, 1952, s. 26.

A detention centre for girls is being built for the first time in the grounds of a women's open prison in Staffordshire. This proposal was vigorously opposed in Parliament on the grounds that the number of girls annually hitherto sentenced to prison for less than six months was negligible and did not justify a special institution, that delinquent girls were usually suffering from deep emotional disturbance and were not suitable for discipline and regimentation, and that many girls sentenced to prison have been prostitutes and are quite unsuitable for detention centres.[9] The Government's view was that the training will be modified to suit the needs of girls, and that there were numbers of girls found guilty of larceny and related offences for whom a period of tight discipline was entirely appropriate.

The Act contains no requirement that social workers should be employed on detention centre staffs, though it is Government policy that this should happen wherever possible.

Detention centres may be used for fine defaulters for a period of from one to six months. Although it was recognised that this was not a particularly satisfactory way of dealing with such offenders, it seemed preferable to a prison sentence.

Fine defaulters aged 14–16 may be sent to remand homes for one month or less (s. 5). This use of remand homes for punitive detention instead of as diagnostic and classifying centres was much criticised. But very short periods in a detention centre are disruptive of its training programme, and prison is undesirable for persons under twenty-one, and impossible for those under seventeen (s. 2 (2)).[10]

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[7] See Grünhut, "After-effects of Punitive Detention," Brit.J.Delinq. Vol. 10 (1960) 178.

[8] H.L. Deb. Vol. 232, col. 30, June 12, 1961, Lord Bathurst.

[9] H.L. Deb. Vol. 231, col. 496, May 16, 1961; H.L. Deb. Vol. 232, col. 34, June 12, 1961. See also the Report of the Advisory Council on the Treatment of Offenders, 1960 (Cmnd. 1213), paras. 18–19.

Remand centres

Very grave disquiet was expressed over the absence of remand centres, originally provided for in 1948. The Home Secretary may provide remand centres, that is to say, places for the detention of persons aged not less than fourteen but under twenty-one who are remanded in custody for trial or sentence.[11] A magistrates' court committing to quarter sessions with a view to borstal training must commit a young offender in custody to prison unless it has been notified that a remand centre is available for the reception of persons of the class and description of the offender; provided that an offender aged 15–16 must, in the absence of a remand centre place being available, be committed to a remand home instead of to prison, unless the court certifies that he is of so unruly a character that he cannot be safely detained in a remand home or of so depraved a character that he is not fit to be so detained.[12] In order that young offenders may be kept away from prison, pending trial, or sentence, or arrival in the institution to which they are ultimately destined, the Government is slightly modifying the emphasis on the building of detention centres in order to release some resources for remand centres. The first remand centre was opened at Ashford in Middlesex on July 17, 1961, and a further seven centres for young male offenders aged under twenty-one are planned for Lancashire, Durham, Leeds, Birmingham, Cardiff, Bristol and Exeter for 1961–64, with a possible eighth at Winchester. Meanwhile all young persons are to be kept rigidly segregated from adult prisoners. An all-purpose combined remand centre and observation centre (the latter for adults) is being built at Risley near Warrington in Lancashire. Women and girls on remand outside London will be sent to Risley and to three other centres to be built as annexes to the new male centres. Arrangements for women and girls in London will depend on what decision is taken regarding the future of Holloway Prison.[13]

Approved schools

The problem here was how to strengthen the powers of the

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[10] H.L. Deb. Vol. 232, col. 59, June 12, 1961.

[11] Prison Act, 1952, s. 43 (1) (*a*).

[12] Magistrates' Courts Act, 1952, s. 28, as amended by the Criminal Justice Act, 1961, Sched. IV, and printed in Sched. VI.

[13] H.L. Deb. Vol. 230, col. 1057, May 1, 1961, Lord Kilmuir, L.C.

Home Secretary to ensure efficient management and to strengthen the hands of the managers in dealing with exceptionally difficult boys.[14] The Home Secretary may now impose a constitution upon any voluntary approved school, *i.e.*, other than one provided by a local authority, which will prevail over any existing trust deed (s. 19 (1)) and he may appoint additional managers (s. 19 (3)). Furthermore, he may give directions relating to premises, equipment, staff, and the education, training or welfare of the boys where these are inadequate or unsuitable (s. 18 (1)) and if these directions are not carried out he may withdraw his certificate of approval and the Government grant and thereby close the school forthwith (s. 18 (2)). He has no power to remove a manager, but he can effectively " tame " any manager by appointing other managers or by closing the school if any directions given are not observed. There is no statutory retiring age for managers of approved schools.

The unruly or subversive boy of fifteen years of age or more may be temporarily removed for twenty-eight days on a justice's warrant where it is necessary to maintain the discipline of the school (s. 15 (1)) to another approved school, or to a remand centre or remand home. He may be taken to a police station for not more than forty-eight hours pending arrangements. The difficulties here are that there is no closed approved school, although some classifying approved schools have closed units; that so far there is only one remand centre available, at Ashford in Middlesex; that remand homes are quite unsuitable since they have neither the facilities nor the staff for ensuring the safe custody of a really difficult boy; and that no one likes the idea of young offenders remaining longer than is absolutely necessary in police stations. Thereafter, the boy may be transferred permanently to another approved school,[15] returned to the approved school from which he came (s. 15 (5)), transferred to a hospital for treating mental illness,[16] charged before the magistrates with serious misconduct,[17] or brought before a magistrates' court with a view to his removal to borstal (s. 16). Where a boy is not less than fifteen years of age and the magistrates are satisfied that his continued detention in an approved school would be ineffective for the purposes of his own reformation or would be detrimental to the training or welfare of the other boys, and are of the opinion that it is in his interests that he should receive training in a borstal institution they may order his removal to a borstal institution. Detention in borstal is not to last longer than the unexpired term of approved school training (s. 16 (3)). Thus magistrates can now transfer to borstal, but they may not impose a borstal sentence as an original sentence.[18]

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[14] See the Report of the Inquiry into the Disturbances of the Carlton Approved School on the 29th and 30th August, 1959, by Victor Durand, Q.C., January 1960 (Cmnd. 937).

[15] Children and Young Persons Act, 1933, Sched. IV, para. 9, as amended by the Criminal Justice Act, 1961, Sched. IV.

[16] Mental Health Act, 1952, s. 72.

[17] Criminal Justice Act, 1948, s. 72, as amended by the Criminal Justice Act, 1961, Scheds. IV and V.

Attendance centres[19]

The changes relating to attendance centres are that the minimum qualifying age is reduced from twelve to ten, the twelve hours attendance may be reduced in the case of an offender under fourteen where the court thinks that twelve hours would be excessive having regard to his age and other circumstances, or increased up to not more than twenty-four where twelve hours is thought to be inadequate, and that the court in all cases must be satisfied that the specified attendance centre is reasonably accessible to the person concerned, having regard to his age, the means of access available to him and any other circumstances (s. 10 (3)). Thus all forms of public and private transport are relevant matters to be taken into account.

"Boston Experiment"

There is no statutory recognition of the "Boston experiment," a scheme whereby persons aged 14–21 who are placed on probation are required to attend youth training centres for two hours daily for a total of 100–150 hours, to receive such training and instruction as would conduce to their reformation and the prevention of crime. But a sub-committee of the Advisory Council on the Treatment of Young Offenders under the chairmanship of Lady Elliott of Harwood is at present investigating the scheme and will report this autumn.

Fines and compensation

As a recognition of inflation, and in order to avoid the necessity which magistrates otherwise might feel of sending offenders to an institution because of the inadequacy of the maximum fine, the maximum fine payable by an offender aged 8–14 is £10 (s. 8 (1)) and by one aged 14–17, £50 (s. 8 (2)). Parents may be ordered to pay compensation, as well as fines, damages and costs, in respect of offenders under seventeen (s. 8 (4)). The provision whereby damages and compensation may be ordered to be paid by an offender placed on probation or given an absolute or conditional discharge, with a £100 limit in the magistrates' courts, is not extended.[20]

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[18] Magistrates' Courts Act, 1952, s. 28, as amended by the Criminal Justice Act, 1961, Sched. IV, and printed in Sched. VI.

[19] Criminal Justice Act, 1948, s. 19, as amended by the Criminal Justice Act, 1961, Scheds. IV and V; and the Criminal Justice Act, 1948, s. 6 (3). See also the Ingleby Committee Report, October 1960 (Cmnd. 1191), paras. 286–295; and *Attendance Centres*—An Inquiry by the Cambridge Institute of Criminology on the use of the Criminal Justice Act, 1948, s. 19 (Cambridge Studies in Criminology), 1961.

Breach of probation

Where an offender under seventeen is placed on probation or given a conditional discharge, subsequently commits a further offence or breaks a condition of probation or discharge, and comes before a magistrates' court when over seventeen, he can always be dealt with for the original offence, whatever its nature (s. 9). The reason for this change was that whereas a magistrates' court had (and still has) power to deal with the original offence as if it had just convicted the offender of that offence,[21] sometimes the original offence was one that was properly dealt with by a juvenile court but was not an offence for which a person over seventeen could be tried summarily, so that the magistrates' court had no power to deal with the offender " as if it had just convicted him of that offence." Therefore, in such circumstances a magistrates' court can now deal with the offender who is over seventeen as if he were in fact being dealt with summarily for an indictable offence.

After-care

Everyone is agreed upon the desirability of after-care, particularly for young offenders. The difficulty is to find sufficient welfare officers to act as supervising officers. The new provisions in the Act will have to await implementation until the probation service has been expanded to undertake the increased burden that will inevitably fall upon it.[22] No Director of After-Care is to be established.

The courts are still unable to place an offender on probation to operate on his release from a detention centre,[23] but now for twelve months following release offenders come under the supervision of a specified person or society and may be obliged to observe " requirements." A failure to comply with any requirement may lead to recall by the Prison Commissioners for the remainder of any unexpired detention or for fourteen days if less than fourteen days remained unexpired.

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[20] Criminal Justice Act, 1948, s. 11 (2).

[21] Criminal Justice Act, 1948, ss. 6 (3) (*a*), 8 (5) (7).

[22] The probation service is at present the subject of an inquiry being conducted on behalf of the Home Office by Sir Ronald Morrison and others.

[23] *R.* v. *Evans* [1959] 1 W.L.R. 26; [1958] 3 All E.R. 673; [1959] Crim.L.R. 133, C.C.A.

Boys from approved schools similarly come under compulsory supervision, for two years following release, and must live with a nominated person and observe any other imposed requirements. Recall without court proceedings lies in the power of the managers, who may extend the original sentence by up to six months if less than six months of the sentence remain unexpired. An interesting innovation is that managers may continue to befriend and advise and even give financial assistance to boys who have completed their period of compulsory supervision.

Particularly vulnerable offenders come under twelve months' supervision following release. They are the young (under twenty-six, including borstal inmates), those who have served long sentences of over four years and experienced great difficulty in reintegrating themselves into society, and those who show recidivist tendencies, namely those who are coming out after a second or subsequent borstal or prison sentence. The offender must keep in touch with a nominated supervising officer and may be obliged to comply with other requirements. A breach of supervision may lead to the offender's appearance before the magistrates, who may order his return to borstal or prison if the case is made out, unless satisfied that it is unnecessary or inexpedient to do so.

Prison Commissioners

The Prison Commissioners have received a suspended sentence of death. The Home Secretary can send their heads rolling by Order in Council (s. 24). It is expected that the axe will fall at the end of 1962.

The arguments for retaining the Prison Commissioners were that they have acquired an outstanding reputation ; that they have shown independence, and a willingness to experiment, and that they enjoy the accumulated wisdom of long experience due to their permanence. They have created a good spirit in the prison service despite difficult conditions, and have always been readily approachable and forthcoming with information. All these assets will be lost if they are converted into a soulless anonymous government department.

The arguments for abolishing the Commissioners were that there is to be no change of policy, that the Prison Board at the Home Office is to continue, and that the alleged " independence " of the Commissioners is illusory, since they always have been civil servants answerable to the Home Secretary, who has in turn been answerable to the House of Commons. The burden of prison reform requires administrative efficiency and constitutional reform.

Reports

Continued criticism of the Children's Department has led to the provision requiring the Home Secretary to give annual statistical reports, and triennial general reports (from 1964) on approved schools, remand homes and attendance centres (s. 25).

Transfer, supervision and recall of prisoners within the British Islands

Part III provides a code for the transfer, supervision and recall of prisoners within England and Wales, Scotland, Northern Ireland, the Channel Islands and the Isle of Man. The basic principle is that transfer may only take place on the application of the prisoner, unless there are no proper facilities for sentence locally (*e.g.*, girls sentenced to borstal in N. Ireland), or he is required to stand trial elsewhere, or he has escaped from custody in another part of the British Islands. A prisoner may not be prejudiced by a transfer, by being required to undergo a tougher or longer sentence, or period of supervision.

II. The Suicide Act, 1961

The Criminal Law Revision Committee, under the chairmanship of Sellers L.J., in their Second Report, October 1960 (Cmnd. 1187), appended a draft Suicide Bill, which received the royal assent on August 3, 1961. Suicide and attempted suicide are no longer crimes, but there is a new offence of complicity committed by any person who aids, abets, counsels or procures the suicide or attempted suicide of another.

The new offence of complicity

It is a novel concept that there can be an accessory before the fact, as it were, to an act which is not itself a crime. Complicity emphasises the sanctity of human life, and meets the case of the man who persuades his girl-friend to commit suicide because she has become an embarrassment to him, or the intended beneficiary who persuades the rich old lady to take an overdose of sleeping tablets because he cannot wait for death from natural causes. " Counsels " imparts a clear positive element of inducement, more than a mere failure to dissuade. Complicity may be tried only at assizes and only by, or with the consent of, the Director of Public Prosecutions. The maximum penalty is 14 years imprisonment, whether the suicide is successful or unsuccessful, as the conduct of the person implicated may be equally serious whether or not death results.

Suicide pacts

As for suicide pacts, if the survivor killed the deceased he is guilty of manslaughter as hitherto, with a maximum sentence of life imprisonment, but if the deceased killed himself, he is guilty of complicity only. There is a distinction between the active and the passive partner in a suicide pact. A verdict of complicity may be returned on a charge of murder or manslaughter.

Accidental killing of another by an attempted suicide

Suppose an attempted suicide kills another accidentally in attempting to kill himself? The Suicide Act is silent on this point, but the Criminal Law Revision Committee thought that this situation could be left to the operation of the general rules of the criminal law as regards the killing of another by means of an act inherently dangerous to life.

Treatment for attempted suicides

The Minister of Health has promised to make arrangements to have psychiatric treatment available for all attempted suicides who come to the notice of the hospital authorities.[24]

Scots Law Regarding Confessions

By A Scots Advocate

> " Innocence claims the right of speaking, as guilt invokes the privilege of silence."—Bentham.

In March this year the Home Secretary announced in the House of Commons that the Lord Chief Justice had agreed that it was now appropriate for the judges to review the scope and operation of the Judges Rules. These Rules are not current in Scotland, but in fact Scots law gives an even stricter protection to the accused in regard to his admissions and confessions. This article attempts to set out the law of Scotland regarding such statements made by an accused, pointing out the advantages and disadvantages of the present law.

Prior to the Criminal Evidence Act of 1898 the accused was not a competent or compellable witness at his own trial, either in Scotland or in England. That Act made him a competent witness, thus allowing the accused to give evidence on his own behalf if he was so advised. Where the accused declines this opportunity in a Scottish trial, it is not usual practice for the judge to make any comment thereon.

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[24] H.C. Deb. Vol. 645, cols. 907–908.

The leading cases

Since that time the common law of Scotland regarding police interrogation and confessions by the accused has been developed through a long line of leading Justiciary cases right down to the present day. The general rule is that there must be fairness to the accused, taking all the circumstances into account.

The rules regarding police interrogation were exhaustively discussed in *Chalmers*[1] and *Manuel*.[2] Prior to these cases, Lord Moncrieff said in 1938 that " when a man has been arrested on a charge of crime it is even elementary that all interrogation by the police must cease."[3] This proposition is so brief as to be misleading. As the law now stands it is probably more strictly accurate to say that no evidence of what an accused said as a result of police questioning after being charged, or even of what a suspect said after suspicion had centred upon him and he was being detained at the police station, will be admitted in evidence in court. The police may, and often do, ask further questions of the accused in regard to matters extraneous to the actual charge, so that they may complete their enquiries. They may seek information as to how the stolen goods were finally disposed of or how the accused's accomplices escaped, but these matters are not dealt with in evidence.

This distinction between police practice and what may be admissible evidence is emphasised by Lord Justice General Cooper in *Chalmers* at page 77 as follows: " I have sympathy with the police in the difficult position in which they are often placed. We have no power to give instruction to the police, but we have the power and the duty to exclude from the cognizance of the jury evidence which, according to our practice and decisions, is admissible; and the police have a right to know why such decisions are taken. Were it possible to do so, I should like to be able to lay down comprehensive rules for the guidance of the police and all the situations which may arise in practice, but I am satisfied that this is impossible because in the borderline case so much turns upon the exact circumstances."

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[1] 1954 J.C. 66.

[2] 1958 J.C. 44. See " The Trial of Peter Manuel," [1958] Crim.L.R. 654.

[3] *Stark and Smith* v. *H.M. Advocate*, 1938 J.C. 170 at p. 175.

Three classes of person who may be questioned by the police

It was laid down in *Bell*[4] that a clear distinction must be made between admissions or confessions from (1) a person who has been charged with the crime and is in custody awaiting trial, (2) a person who has been detained on suspicion, and (3) a person who has neither been detained nor charged, and against whom there may be no evidence justifying detention, charge or even suspicion, but who is merely being questioned by the police in the execution of their duty of investigating a crime. In categories (1) and (2) evidence of what the person said under interrogation by the police would not be admissible evidence.

As regards class (3), brief reference may be made to the facts of *Bell's* case. A detective-lieutenant investigating a case of rape arrested a seaman identified as one of two assailants. When the detective was interviewing one of the seaman's shipmates the latter volunteered a statement which seemed to implicate himself. The shipmate was later charged and convicted, and appealed on the ground that his voluntary statement was inadmissible. The court held that as the statement had been volunteered in the course of answers to questions properly and fairly put to him as an ordinary citizen neither charged with the crime nor detained on suspicion, the evidence was admissible although there had been no warning.

In classes (1) and (2) even an invitation to speak without questioning is prohibited. In *Wade* v. *Robertson*[5] an accused in custody was told that he would be asked some questions which he need not answer and that his answers might be used in evidence against him. Before any questions were asked the accused made a statement. It was held on appeal that it was inadmissible.

It is recognised that where the individual is in class (2), *i.e.*, detained under suspicion, or as it may more euphemistically be expressed " at the police station assisting the police in their enquiries," this can be the most dangerously unfair period for him, since he does not have the benefit of the various safeguards given to an accused. In *Aitken's* case,[6] Lord Anderson said " It seems to me that the court should be more jealous to safeguard the rights of a prisoner in a case where a charge has not yet been made but where the prisoner has merely been detained by the police on suspicion."

Procedure on a defence objection to the admissibility of a statement

A statement made by an accused person is not admissible as evidence unless the court is satisfied that it is spontaneous and voluntary and has been given without interrogation. Should the defence wish to challenge the admissibility of a statement made by an accused, it may be necessary to have a preliminary enquiry as to the circumstances on the making of the statement. The procedure in the Scottish Courts when the Crown wishes to lead evidence of such a statement is as follows. The witness, normally a police officer, will be invited to read out what the accused was noted as saying, or to recollect his words if they were not taken down. On objection by defence counsel, the jury will then withdraw, the statement will be read out in evidence, and the witness may be cross-examined regarding all the surrounding circumstances. The judge will then hear argument on whether the statement is to be regarded as a " voluntary " one and whether it would be fair to the accused to admit it. If the judge allows the evidence to be heard, the jury are brought back, and the evidence is recapitulated by the witness for their benefit. In the judge's summing up he will tell the jury that while the statement has been allowed as evidence, it is a matter for them what weight and value are to be given to it having regard to all the circumstances, and whether they consider it was freely and voluntarily given.

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[4] 1945 J.C. 61.

[5] *Wade* v. *Robertson*, 1948 J.C. 117.

[6] 1926 J.C. 83.

Statements volunteered by accused persons in custody

What happens when an accused person in custody wishes to make a voluntary statement? The practice of emitting a declaration before a magistrate has largely fallen into disuse since the 1898 Act. But in *Chalmers*, the Lord Justice General referred with approval to various dicta by judges in cases both before and after that Act to the effect that admissions or confessions by an accused or a suspect should preferably be taken before a magistrate.

The police authorities in Scotland appear to have been reluctant to follow this practice. There may be a number of reasons for this: the accused may change his mind about making a statement when taken before the magistrate ; a magistrate may not always be quickly and conveniently found ; and in many cases the confession may be brought about before the police have opportunity to caution the accused or before they are prepared to write down what he says.

Indeed, between the decision of *Chalmers* in 1954 and the case of *Manuel* in 1958, there was considerable doubt whether any statement of an accused to the police made while in custody after caution and charge could be admissible as evidence. The position was finally clarified by Lord Justice General Clyde in *Manuel*[7] where he said: " There is nothing to prevent a man who is detained by the police or who has even been charged with the crime from making a voluntary statement to the police, if he chooses to do so. And it is perfectly proper that such a statement if made should be proved in evidence to the jury, as one of the features for them to consider in deciding whether the crime has been committed. But the test is always whether that statement has been fairly obtained."

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[7] For a critical article see " The Trial of Peter Manuel " [1958] Crim.L.R. 654, by the present writer.

Proposal to restore compulsory examination by the Sheriff

In Scotland there is no preliminary hearing before magistrates in the English sense. It has been suggested by Professor T. B. Smith [8] however that the restoration of the traditional compulsory judicial examination by the Sheriff of the accused—who would have the right to refuse to answer incriminating questions—might assist the courts in the elucidation of the truth. This statement by the accused would be competent evidence at his trial. This system would have the advantage of removing the main inducement to the police to secure " voluntary " statements of doubtful spontaneity.

The law summarised

The rules of Scots law for the conduct of investigations and interrogations by the police may be summarised from the cases of *Bell, Chalmers* and *Manuel* as follows [9]:

1. During the initial routine inquiries regarding a crime, the police may question whom they please with a view to detecting the guilty person. Voluntary statements to the polic by persons not under suspicion at that time may be used in evidence at the trial of such person subsequently charged with the crime under investigation.

2. Once suspicion has fallen upon a particular person further questioning by the police is not advised. If there is cross-examination, unfair pressure, inducement or bullying the statement will be excluded.

3. Once a person is arrested and charged the task of the police in investigating the crime is complete. No further questions should be asked of the accused, who is entitled immediately to legal advice.

4. Once a person is under suspicion or charged he may ask to make a voluntary statement. Ideally this should be done before

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[8] *British Commonwealth Law Series*, United Kingdom volume, p. 761, and in a forthcoming article in *Howard League Journal*, entitled " Fairness to the Accused in Scottish Criminal Proceedings."

[9] For alternative summaries, see Smith, *loc. cit.*, p. 760, and the same author's summary in the Appendix to the Report on Preliminary Investigation of Criminal Offences, *Justice*, 1960; [1960] Crim.L.R. 816.

a magistrate. The statement will be admitted in evidence only if it is a voluntary one. Any questions asked by the police must be purely for clarification. If the statement is objected to at the trial on the ground that it was improperly obtained, the court is entitled to hear evidence of the circumstances in which the statement was given.

5. It is not the function of the police when investigating a crime to direct their endeavours to obtaining a confession from the suspect to be used in evidence against him at the trial. If an accused is cross-examined to obtain a confession the impropriety of the proceedings cannot be cured by the giving of any number of formal cautions, or by the introduction of some officer other than the questioner to record the ultimate statement.

Use of tape recordings

It has on occasions been suggested that if the voluntary statement of an accused person were tape recorded instead of being written down, that would lessen the risk that the statement was improperly obtained. There are a number of objections to this idea. Unfamiliarity and self-consciousness might well silence the accused when confronted with the microphone; the proceedings and the actions of the police prior to the recording would not be revealed on the tape; the tape could be interfered with after the statement was made; and the circumstances of the recording might not make for clarity.

Tape recorders were in fact used in a case of blackmail heard in the Glasgow High Court last year.[10] The police made a recording of the conversation between a blackmailer and his victim, using a miniature microphone and radio transmitter concealed on the person of the victim. It was argued on appeal that the evidence had been obtained illegally or irregularly. This contention was rejected, the court holding that both the recording and the evidence of the police officer as to what he had heard over the radio transmitter were competent evidence.

Need for corroboration

Under Scots law no person can be convicted on his own confession alone. Lord Justice Clerk Thomson said in *Connolly's* case[11]: " A confession of guilt—short of a formal plea of guilty—is not enough. There must be evidence from some other source which incriminates the accused. If all that the Crown can produce is evidence—however complete and exhaustive—that a crime has been committed, together with evidence, however credible, that the accused confessed to having committed it, the Crown must fail. There must be something incriminatory of the accused spoken to by someone other than the accused."

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[10] *Hopes* v. *H.M. Advocate*, 1960 S.L.T. 264; [1960] Crim.L.R. 566.

[11] 1958 S.L.T. 79 at p. 80.

Conclusion

These rules have been found to operate fairly well in practice. There is no doubt that there is an almost extreme solicitude on the part of the courts to ensure fairness for the accused. As Lord Justice General Clyde said in *Manuel's* case: "The law of Scotland goes further than many other legal systems in protecting a person who is detained by the police from any risk of being driven or cajoled or trapped into admissions of guilt, even though this may complicate the quite legitimate detection of crime by the authorities, so anxious is our law to secure that such persons get fair play under our system of criminal administration, and so firmly rooted in our law is the principle that no man is bound to incriminate himself."

The Admissibility of Tape Recordings in Criminal Proceedings: A Comparative Note

By R. E. AULD, LL.B., *Barrister-at-Law*

With the recordings of Eichmann's confessions in the news recently we are prompted to inquire how far tape-recorded evidence is admissible in the criminal courts in this country and how far the practice compares with that in the United States of America. It has now been held by several High Court judges, albeit with some reluctance, that tape recordings of incidents and statements the subject-matter of a trial are admissible in evidence. This novelty is a concession to the post-war development of recording techniques, and it has arrived a little more slowly in this country than it did in the United States of America. In this article it is proposed to compare the solutions to problems raised by this type of evidence which have been suggested on both sides of the Atlantic.

In criminal trials tape or wire recordings have been particularly useful in three respects; firstly, with regard to confessions, secondly, where the recorded words are themselves a constituent of the offence, and thirdly, where it is important to catch the tone of the words, what prompted them and what effect they had on the hearer.

Confessions

There appears to be no decided case in English law in which a recorded confession has been used in evidence in a criminal trial. Its advantages are enormous, particularly in the case of the illiterate prisoner. It will have far greater probative force to a jury than a statement taken down in longhand by a policeman. Counsel will no longer be able to suggest that the policeman is making up the accused's statement or that he has missed something out. In a report of a Committee appointed by " Justice " to inquire into Preliminary Investigations of Criminal Offences the use of tape recordings for such purposes was favourably received, but with some doubts as to the possibility of safeguarding against falsification. However, it was suggested that it would be a useful experiment to instal tape-recorders in police cars so as to record statements made by witnesses " on the spot " in motoring cases.[1] Glanville Williams strongly recommends the use of tape-recorders in the case of first statements made by the accused to the police.[2]

Recorded confessions have been used quite frequently in the United States of America.[3] The following comment appears to Rule 505 in the Model Code of Evidence drawn up by the American Law Institute in 1942:

> " In some instances confessions taken by the police have been recorded by a sound film. To impose a requirement on the police that they should take no confession unless recorded is believed to be practicable, effective, and desirable. . . . Certainly, wherever it is practicable to supply and use the necessary equipment in a reasonably efficient manner it should be done and the courts should encourage such procedure in any legitimate manner."

The use of such recordings has not become so widespread in the United States as the authors of this comment hoped, but certainly their admissibility is no longer doubted where they are properly proved.

Where the spoken words are themselves part of the offence

What better evidence could there be where, as in cases of blackmail, bribery, threats, inducement to commit a crime, and sedition, the speaking of the words recorded itself constitutes the offence? It is similar to photographs of an offender caught red handed in the act of murder or house-breaking.[4] Recordings of conversations in these circumstances have repeatedly been held by English and American courts to be admissible. But the admissibility of transcripts of these recordings is more doubtful. In a case where two men were charged with a conspiracy to prevent the course of justice a recording of a conversation which took place at a police station was held admissible by Hilbery J. as best evidence. The recording was first played to the jury and they were then given a transcript to " assist " them, and the tape was played over again.[5] In the following year magistrates at Kingston refused to admit a transcript of a tape on the ground that it was hearsay.[6] In *R.* v. *Bracey* in 1959 Slade J. admitted a recording of an argument between husband and wife to show who was the aggressor, but at the same time indicated that he would have preferred a transcript; a strange preference in the circumstances.[7] The question of the transcript was discussed more fully last year in the Scottish case *Hopes & Lavery* v. *H.M. Advocate*.[8] This concerned an appeal by two persons convicted of extorting money by threats. There was evidence of a meeting where the victim wore a lapel microphone and transmitter. The conversation was relayed to a police receiving set nearby where it was recorded by a tape-recorder. A stenographer's shorthand note of the recording was held to be probably inadmissible, although the recording itself was played over as evidence.

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[1] Para. 30; [1960] Crim.L.R. 807.

[2] J.S.P.T.L. 1957–58, 217.

[3] *People* v. *Curtis*, 286 P. 2d 446, 134 C.A. 2d 642; *Wright* v. *State*, 79 So. 2d 66, 79 So. 2d 262 Ala. 420.

On balance the present rule of English law would seem to be that a written transcript of a recording is either hearsay or secondary evidence. But there seems to be no reason why a transcript cannot be introduced along with the recording to help a jury where the whole of the recording is clear. In the United States the courts have been less cautious. The New York Court of Appeals has held that a trial court can properly admit the transcript of a recording of wire-tapped conversation of an accused person which may result in his conviction.[9]

The recordings themselves, as opposed to transcripts, have been received in evidence very often in criminal trials in the United

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[4] *Infra*, p. 604.

[5] *R.* v. *Burr & Sullivan* [1956] Crim.L.R. 442.

[6] Note [1957] Crim.L.R. 709.

[7] *The Times*, Feb. 25, 1959; [1959] Crim.L.R. 231.

[8] [1960] Crim.L.R. 566; also it was suggested that if the stenographer had special qualifications for the task the transcript would have been admissible. See also *P. F.* v *Wyse & Another* [1961] Crim.L.R. 244.

[9] *People* v. *Variano*, N.Y.C.A., 1959, p. 391, 2nd Series.

States. For example, in a prosecution for soliciting another to commit murder a recording of a conversation between the defendant and the person solicited was held admissible.[10] And in another case, recordings of telephone conversations between an accused and an alleged accomplice were admissible in a prosecution for being an accomplice to a crime of robbery.[11] There are many more.

Where the way in which the words are spoken is important

A recording can bring out the mood of the moment, the tone of the words and the reaction of the hearer to them, whereas the printed word is quite lifeless. So, for example, in the case of *Bracey*[12] where it was important to show who was the aggressor in the husband and wife quarrel, the tape recording of the squabble gave the answer. It would have been impossible to make an adequate note of this exchange since for the greater part of the argument they were both talking together. Again, in a recent case of sedition in Nyasaland[13] where the defence case rested largely on the reaction of the crowd listening to two seditious speeches, a recording was invaluable in translating those indeterminate and incoherent crowd noises of approval and disapproval which the printed word could not convey.

Difficulties in the use of recordings as evidence

(1) *Authenticity.*

Having seen the use to which such recordings can be put it is interesting to note what problems the courts have had to overcome in accepting them. The first difficulty which springs to mind is the question of authenticity. Recordings, like photographs, must be proved. In this respect American lawyers have been more specific in formulating the requisite tests for authenticity. Wigmore has suggested the following five requirements[14]:

(a) That the party charged spoke the words at a certain time into the microphone[15];

(b) That the sending apparatus was capable of effective transmission to a particular spot;

(c) That at that spot was a receiving apparatus capable of effectively reproducing the utterances starting from the sending apparatus;

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[10] *People* v. *Albert,* 6 Cal.Rptr. 473.

[11] *Schwartz* v. *State,* 246 S.W. 2d 174.

[12] *Supra,* note 7.

[13] *R.* v. *Chipembere, The Times,* Feb. 11, 1961.

[14] *Evidence,* 2nd ed., Vol. VIII, 2157.

[15] See *People* v. *Fratiano,* 282 P. 2d 1002, 132 C.A. 2d 61c; *State* v. *Lyskoski,* 287 P. 2d 114, (Wash.) 1955.

(d) That at the receiver a witness heard, reproduced at the time in question, the words uttered into the microphone;

(e) That at the time and place of receiving no other person was speaking into another microphone impersonating the party charged.

Most of the American cases have added to or glossed the above requirements by saying that it must be shown that changes, additions or deletions have not been made and that the manner of preserving the recording must be indicated. And, of course, a recorded confession, just as a written one, must be voluntary.[16] The first four of Wigmore's requirements do not generally give much difficulty. The fifth condition presents a greater problem. In most cases where the recording is taken within sight and sound of the person producing the recording there is no difficulty. But it becomes almost an impossibility when the recording takes place where no third party is present at all; for example, where a tape-recorder has been "planted," or in the case of a recorded telephone conversation. American case law reveals many occasions when recorded telephone conversations have been held admissible without the fifth guarantee.[17]

(2) *Tampering*

More difficulty has been found with the problem of intermediate tampering. In an article in this Review in 1954[18] the technical possibilities of tampering were fully canvassed and it was then accepted that no completely foolproof method of preventing subsequent alteration could be found. The keeping of the tape in a locked container between the time of recording and the trial seemed to be the simplest and the most practicable. The Committee recently appointed by "Justice" to inquire into the Investigation of Criminal Offences found that the locked container suggestion still had the most to commend it, but added that future technical developments should be watched. It is difficult to see why such an objection should prove so formidable since photographs, if properly proved, are readily accepted by the courts, yet they are equally susceptible to falsification. In any event, despite the failure to provide absolute safeguards, courts on both sides of the Atlantic accept recorded statements in conjunction with the oral evidence of persons who took the recording, and will accept their word that the recorded matter is genuine.

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[16] *Steve M. Solomon Inc.* v. *Edgar*, 88 S.E. 2d 167 Ga.App. 1955; *Wright* v. *State*, 79 So. 2d 66, 79 So. 2d 262, 262 Ala. 520; *Files* v. *State*, 81 So. 2d 303, 263 Ala. 89.

[17] *People* v. *O'Hara*, 8 Cal.Rptr. 114; *Schwartz* v. *State*, 246 S.W. 2d 174; *People* v. *Fratiano*, *supra*.

[18] T. B. Radley, "Recording Testimony to Truth," [1954] Crim.L.R. 96.

(3) *"Dubbing"*

Sometimes statements are transferred from one tape to another, or from a wire recording to a tape-recorder. This is known as "dubbing." Should this dubbed recording be treated in the same way as the original? It is very similar to the position of a carbon or certified copy and if it is proved in the same way, that is, if oral evidence is given that it is an exact rendering of the original, there seems to be no reason why it should not be admissible. A Washington State Court has compared the re-recording to a photographic print and the original wire or tape recording to a negative and stated that the same principles apply equally well to both.[19] This seems to be eminently sensible. The best evidence of this would be that of the person who was present at the dubbing.

(4) *Imperfect recordings*

Recordings may be so inaudible as to be of little use. This may happen because the machine itself is at fault or because some old recording has not been properly rubbed off the tape. The recording may be so bad that it should not be admitted at all, but if only patches of it are imperfect there is no reason why the remainder should not be admissible. So far, there is no English ruling on this point. American courts follow the practice of admitting the articulate parts.[20] In such cases witnesses who heard the conversation are required to fill in the gaps.[21] But where a tape is inaudible in portions likely to be material to the issue, the whole recording will be rejected if it is the only evidence offered as to these statements.[22]

(5) *Inadmissible or prejudicial elements*

Another closely connected problem is where part of a prisoner's recorded statement is prejudicial or irrelevant, for example, if the accused refers to previous convictions. Here the solution suggested by an Alabama State Court in *Wright* v. *State*[23] is that the inadmissible portions should be erased from the tape and the rest should be allowed, but that if this is not possible then the whole recording should be withdrawn from the jury. Since it is this very facility of erasure which provides the suspicion of tampering there seems to be no reason why the evil cannot always be remedied by " cutting" or rubbing out. Indeed in a civil case in 1940,[24] Mackinnon L.J. in the Court of Appeal had no qualms about the validity of a recording which " faithfully recorded every word uttered " but which had some of the more colourful epithets " indicated by blanks in deference to forensic decorum." [25] In a criminal case with a jury, obscene language, or the manner in which certain words are spoken might prove prejudicial to a defendant. In the Californian case of *People* v. *Palmer* [26] where some gruesome photographs were tendered in evidence in a criminal prosecution it was held that a trial court must decide as a question of fact whether their probative value outweighs their possible prejudicial effect. If it will do so then such photographs should be admitted. This same measuring rod should apply to recorded statements. In *State* v. *Lyskoski* [27] the prejudicial effect of obscene language was found not to outweigh the probative weight of the evidence.

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[19] *State* v. *Lyskoski, supra*; *People* v. *Albert, supra*; *cf. People* v. *King*, 225 P. 2d 950.

[20] *State* v. *Lyskoski, supra.*

[21] *People* v. *Stephens*, 256 P. 2d 1003.

[22] *Wright* v. *State, supra.*

[23] *Supra.*

The desirability of oral evidence in addition

It seems that although properly established recordings have overcome the best evidence rule both here and in the United States, wherever oral evidence can be given as to the contents of the spoken words it should be given in addition to the recording. This has been the practice in the few English cases reported, and in almost every American decision this writer has looked at, additional oral evidence has been called. In *People* v. *Sica* [28] it was held that the oral evidence of policemen who overheard the incriminating conversations recorded should also be given since their evidence was the primary evidence.

Prospect

The solutions suggested by the American courts to the various problems raised here seem on the whole to have been particularly sensible. The relatively few English decisions on the same points have shown a surprising correspondence with the trans-Atlantic approach. Let us hope that undue technicality in the law will not hamper the further use of recording devices and that technical developments will solve the worry of faked recordings.

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[24] *Harry Parker, Ltd.* v. *Mason* [1940] 2 K.B. 590.

[25] *Ibid.* p. 599.

[26] 8 Cal.Rptr. 482.

[27] *State* v. *Lyskoski, supra.*

[28] 247 P. 2d 72, 112 C.A. 2d 574.

Practice and Procedure

PRACTICE NOTE

Offences taken into consideration

In R. *v.* MASSIAH the Court of Criminal Appeal (Slade, Havers and Sachs JJ.: July 25, 1961) considered the practice to be followed when a defendant wished the court of trial to take other offences into consideration. Havers J., giving judgment, said that the trial judge when passing sentence had taken into account another offence which M. was said to have committed. It now appeared that M. did not admit this other offence and had not wanted it to be taken into consideration. The misunderstanding had arisen because M.'s counsel had been asked whether M. wanted the offence taken into consideration. The usual and the proper practice was for the "T.I.C." form to be presented to the accused person (which he could sign if he wished) and for the trial judge to be given a copy. The trial judge himself invariably asked the defendant whether he admitted all or any of the offences specified on the form and, if so, whether he wanted any or all of them to be taken into consideration. If the defendant asked for the offences to be taken into consideration the judge then exercised his discretion as to whether or not he would do so. [H. P.]

*Case and Comment**

APPEAL

Fresh evidence given before Court of Criminal Appeal exonerating accused—principle applied by the court

R. v. Bowman

Court of Criminal Appeal: Ashworth, Elwes and Thesiger JJ.: July 3, 1961: *The Times*, July 4, 1961.[1]

B. was convicted at assizes of wounding with intent to do grievous bodily harm. The charge arose out of a fight at a café and, at the trial, evidence for the prosecution was given by a Miss C., who had been serving at the café on the night in question. On appeal to the Court of Criminal Appeal the court gave leave to call fresh evidence and, accordingly, one X. (whose whereabouts were unknown at the time of the trial) gave evidence exonerating B.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: *Brian Bush* (instructed by Newsome & Co., Coventry). For the Crown: *James Burge* (instructed by Blythe, Owen, George & Co., Coventry).

Held, dismissing the appeal, that this court, having heard the evidence of X., disposed of it on two grounds. First, it was impossible to say that if it had been available at the trial the jury would have been disposed to accept it in preference to that of Miss C., which clearly they did believe. Secondly, this court was unanimously of the opinion that X.'s word was not to be relied on and that he was clearly not a witness of truth. The appeal would be dismissed. [H.P.]

Commentary. When the court has heard fresh evidence it follows the same principle as governs the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907; *i.e.*, it dismisses the appeal only if satisfied that no reasonable jury, properly directed, would or could have come to any other conclusion than that to which they did come and that no miscarriage of justice has actually occurred: *R.* v. *Collins* (1950) 34 Cr.App.R. 146.

BETTING AND GAMING

Betting and Lotteries Act, 1934, s. 22 (1)—Small Lotteries and Gaming Act, 1956, s. 4—tombola on club premises—proceeds used for general expenses of club—whether this amounted to " private gain "

Payne v. Bradley

House of Lords: Lords Denning, Goddard, Morton, Morris and Guest: [1961] 3 W.L.R. 281.[2]

Sessions of tombola were held on various occasions in a working-men's club. Sets of tickets were sold on the club premises, each ticket entitling the holder to take part in one session of tombola. The sessions were conducted as an entertainment on their own, and were not incidental to any other form of entertainment. The prizes were sums of money, and the sale of tickets was not confined to members of the club. After deduction of the prize money, the proceeds from the sessions were paid into the general funds of the club, and appeared in the profit and loss account out of which the general expenses of the club were met. Under the rules of the club, no surplus of the funds was divisible among the members individually.

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[2] For the appellants: *P. M. O'Connor, Q.C.*, and *Arthur Hutchinson* (instructed by Biddle, Thorne, Welsford & Barnes, for G. E. Hutchinson & Co., Huddersfield). For the respondent: *Mervyn Griffith-Jones* (instructed by Sharpe, Pritchard & Co., for H. Bann, Huddersfield).

The trustees and committee of the club were charged with using the club premises for purposes connected with the conduct of the lottery, contrary to section 22 (1) of the Betting and Lotteries Act, 1934. The defendants relied on the exemption contained in section 4 of the Small Lotteries and Gaming Act, 1956. The magistrates convicted.

The magistrates found that the sessions of tombola were a lottery.

On appeal to the House of Lords, the sole question was whether the money paid into the general funds of the club was applied for "purposes other than purposes of private gain" within section 4 of the Act of 1956:

Held (Lords Denning and Morris dissenting) that the exemption contained in section 4 of the Act of 1956 was inapplicable since the proceeds of the gaming were paid into the general funds of the club, which was a members' club, and since, therefore, each individual member of the club derived a personal gain from the proceeds.

[D. C.]

Commentary. The view of the majority was that the proceeds of the lottery amounted to a "private gain" to the members since it enabled the club to avoid a deficit which could only have been met by increasing the subscription or reducing the amenities of the club.

Lord Denning agreed that if a "social club founded by a group of persons for their own enjoyment or recreation" were to hold tombola sessions so as to raise money for its purposes, this would be a private gain; but he held that this club was "altogether different," being founded for the purpose of "affording the members the means of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation." In his lordship's view it was "concerned not with the private interests of the members, but with the advancement of social welfare." This is a distinction between two types of club which might prove rather difficult to draw in practice and seems to turn to some extent on one's approval or otherwise of the purposes of the society. It may be that it is a little unrealistic to rely on the express objects of the club. *The Times,* in an article on working men's clubs, refers to their "best known object of providing working men with a comfortable exclusiveness in which to drink beer." (July 25, 1961) Lord Morris thought that, in this context, "for the purposes of private gain" denoted as an objective the personal acquisition of money (or money's worth) by individuals. But were not individuals (indirectly) acquiring money's worth as a result of these tombola sessions?

It was not necessary to decide whether the club could register under section 1 of the Act of 1956 as "a society established and conducted wholly or mainly for . . . purposes . . . not being purposes of private gain. . . ." Lords Denning and Morris, of course, thought that it could;

though whether they would still so hold now that they are bound by the meaning of "private gain" under section 4 established by this case is another matter. Lord Goddard seems to have thought that the club could so register, Lord Morton did not advert to the question and Lord Guest reserved his opinion on it. To hold that the club could register involves finding that "private gain" has a different meaning under section 1 from that attributed to it under section 4; but it is not unknown for the same phrase to be given different meanings in two sections of the same Act.

COURT-MARTIAL

Army Act, 1955, s. 70—more than one intent charged for causing grievous bodily harm—whether bad for duplicity—Rules of Procedure (Army), 1956, r. 15

R. v. Naismith

Courts-Martial Appeal Court: Ashworth, Paull and Elwes JJ.: May 17, 1961: [1961] 1 W.L.R. 952.[3]

N. was convicted of a civil offence contrary to section 70 of the Army Act, 1955. The charge sheet stated that he had caused grievous bodily harm to another "with intent to do him grievous bodily harm or to maim, disfigure or disable him," the corresponding civil offence being an assault causing grievous bodily harm contrary to section 18 of the Offences Against the Person Act, 1861. He appealed to the Courts-Martial Appeal Court on the ground that, because more than one intent had been alleged, the charge was bad for duplicity, contrary to rule 15 of the Rules of Procedure (Army), 1956:

Held, dismissing the appeal, that there was a distinction between a section creating two or more offences and a section creating one offence but providing that the offence could be committed in more than one way; and the different intents specified in section 18 were variations of method rather than the creation of different offences. The only species of assault alleged in the charge sheet was causing grievous bodily harm. Further, a charge of a civil offence was sufficiently particularised if it was framed in a way which would be sufficient in a civil court having jurisdiction to try that offence; and since there could have been no objection had the present charge been a count in an indictment, the charge was a good one. [H. P.]

Commentary. Rule 5 of Schedule I to the Indictments Act, 1915, provides that "where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative . . . or with any one of any different intentions or states any part of the offence in the alternative, the acts, omissions or intentions or other matters stated in the alternative in the enactment, may be stated in the alernative in the count charging the offence." This has received a somewhat restricted interpretation. Thus, an indictment under section 8 (1) of the Larceny Act, 1916, charging a prisoner in one count that he "stole or, with intent to steal, ripped and severed or broke," certain fixtures, was held bad for uncertainty: *R.* v. *Molloy* [1921] 2 K.B. 364. It was held, in effect, that stealing fixtures was one offence and ripping, severing or breaking them, another. It was pointed out that ripping or severing is not necessarily stealing, since that requires an asportation after severance, and it was said, therefore, that it was "obvious," that the indictment charged two felonies. The logic of this seems doubtful, for it might equally be said that ripping or breaking is not necessarily severing; and thus the rule would be deprived of all effect, except in the unlikely case of a statute using alternative terms to describe precisely the same act. *Molloy* was followed in *R.* v. *Disney* [1933] 2 K.B. 138 and *R.* v. *Wilmot* (1933) 149 L.T. 407.

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[3] For the appellant: *A. Dawson* (instructed by the Registrar, Courts-Martial Appeal Court). For the Crown: *E. Garth Moore* (instructed by the Director of Army Legal Services).

In the present case, the alternatives were in the *mens rea*, whereas in the earlier cases they were in the *actus reus*; but that ought not to be significant, for it will be noted that Rule 5 refers both to different acts and to different intentions. Is an intent to do grievous bodily harm necessarily the same as an intent to maim, or to disfigure, or to disable? If it is, the statement of the alternatives seems to be quite pointless. If it is not, the case becomes difficult to distinguish from *R.* v. *Molloy*.

The restricted interpretation of Rule 5 adopted in the earlier cases arises, no doubt, from the courts' aim to ensure that justice is done in the important respect that the prisoner has sufficiently precise notice of the offence with which he is charged. Where the alternatives specified in a section of an Act have a high degree of diversity, a literal application of Rule 5 might cause the defence embarrassment. But the narrow interpretation must cause some uncertainty as to the side of the line on which any particular case falls.

For the analogous problem on summary trial, see *Bastin* v. *Davies* [1950] 1 All E.R. 1095 and *Thompson* v. *Knights* [1947] K.B. 336. *Cf. Dickson* v. *Brown* [1959] Crim.L.R. 787.

DISORDERLY HOUSE

Clubs in which strip-tease performances were given—elements of the offence of keeping a disorderly house—admissibility of film of performance in evidence

R. v. Quinn : R. v. Bloom

Court of Criminal Appeal: Ashworth, Paull and Howard JJ.: [1961] 3 W.L.R. 611.[4]

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[4] For Quinn: *Edward Clarke, Q.C., L. Lewis* (instructed by Stanley Levene). For Bloom: *Christmas Humphreys, Q.C., J. Burge* (instructed by Kingsley, Napley & Co.). For the Crown: *Sebag Shaw* (instructed by the Solicitor, Metropolitan Police).

Q. and B. were separately tried and convicted of keeping disorderly houses. In each case the prosecution arose out of striptease performances which took place at premises where Q. and B. respectively carried on business as proprietors of clubs. In Q.'s case the jury were directed that if they came to the conclusion that " this club consisted of premises upon which there were performed acts of a lewd, disgusting, depraving and debauching nature, that would constitute a disorderly house, because those sort of things going on on premises of that sort would be against public policy, against the common law which is the etiquette of this country. Here the prosecution go further, because they say that not only was this performance disgusting, lewd and lascivious, but it was also obscene. For a performance to be obscene means something which tends to corrupt or deprave." In B.'s case the jury were directed as follows: " If you come to the conclusion on the facts that what was being portrayed here was obscene, lewd, disgusting, lascivious and so on, then that conduct would amount to a public mischief, that is to say, conduct against ordinary decent public ethics. If that were so it would be a public mischief." And later: " Now you have got to make up your minds, as ordinary common-sense people, what was going on. Was it lewd, obscene, something which would disgust you as ordinary reasonable citizens, because if it was then that would be bawdy conduct and . . . that would be a disorderly house." On appeal to the Court of Criminal Appeal in each case:

Held, dismissing the appeals, that the offence of keeping a disorderly house was an offence at common law, but there was apparently no reported case laying down a comprehensive definition of the offence. In some cases prosecutions had been successful where the persons resorting to the alleged disorderly house had themselves taken part in illegal practices: for example, *R.* v. *Higginson* (1762) 2 Burr. 1233 and *R.* v. *Berg* (1927) 20 Cr.App.R. 38. However, misbehaviour or illegality on the part of persons resorting to the premises in question was not an essential element of the offence. In other cases a disorderly house might amount to a common nuisance, but it need not do so in order to constitute the offence: see *R.* v. *Rice* (1866) L.R. 1 C.C.R. 21. It seemed to this court that the recent case of *Shaw* v. *D.P.P.* [1961] 2 W.L.R. 897, was helpful on the question of the definition of a disorderly house. It was true that the material charge in that case was of conspiracy to corrupt public morals, but much of the reasoning of the majority was equally applicable to the present appeals. Where the charge of keeping a disorderly house was based on indecent performance or exhibitions, the correct definition was: " A disorderly house is a house conducted contrary to law and good order in that matters are performed or exhibited of such a character that their performance or exhibition in a place of common resort (a) amounts to an outrage of public decency or (b) tends to corrupt or deprave or (c) is otherwise calculated to injure the public interest so as to call for condemnation and punishment; but the alternatives are not mutually exclusive." In the view of this court, the issue had been left to the jury in each case in a form consistent with the principles referred to. In Q.'s case there was a further question as to whether a film purporting to portray what three of the performers actually did in the course of their acts had been rightly held inadmissible. It was true that demonstrations, for example, as to the way a blow had been struck, were frequently given by witnesses in the witness box; but such demonstrations were altogether different in character from a reconstruction of an entire scene brought into existence in private for the purpose of constituting evidence at the trial. Such a method of proof would be most unsatisfactory for the reason that it would be impossible to analyse slight differences resulting in a secene of quite a different character than that performed on the night in question: such evidence was not the best evidence. For the foregoing reasons both these appeals would be dismissed. [H. P.]

Commentary. Stephen J., in Article 238 of his *Digest of the Criminal Law*, wrote: " The following houses are disorderly houses, that is to say, common bawdy houses, common gaming houses, common betting houses, disorderly places of entertainment." But it was said by Avory J. in *R.* v. *Berg* that this definition was not meant to be and was not exhaustive. In that case, the Recorder had adopted Webster's Dictionary definition under *disorderly*: " Not regulated by the restraints of morality; unchaste; of bad repute, as a *disorderly* house." Of this, the court said that it " is somewhat vague, but would be correct if the element of keeping open house is present and there is added ' being so conducted as to violate law and good order.' " Without the addition, Webster's definition is impossibly wide; with the addition, the definition is not very informative, for it leaves open the question, what is a violation of law and good order? *Berg's* case, in any event, was a charge of conspiracy to corrupt the morals of and debauch persons resorting to a certain disorderly house, apparently used for unnatural practices. The present case charged a substantive misdemeanour and went further in that it was held that it was immaterial that there was no allegation of misbehaviour or illegality on the part of persons resorting to the premises.

The statement of principle accepted by the court seems to go much farther than any decided case. Alternative (c), particularly, " matters . . . of such a character that their performance or exhibition in a place of common resort . . . is otherwise calculated to injure the public interest so as to call for condemnation and punishment," is extremely wide and leaves it open to the court (subject to the jury's " sovereign power of acquittal") to hold any type of performance to which they take exception to be criminal. The decision is in the same spirit as *Shaw* v. *D. P. P.* [1961] Crim.L.R. 468, and reveals the courts once more adopting the rule of custodian of public morals. Much of the commentary on that case applies equally here.

It would seem, with respect, that the evidence concerning the film was rightly excluded on the principle of *Holcombe* v. *Hewson* (1810) 2 Camp. 391 and *Hollingham* v. *Head* (1858) 4 C.B.(N.S.) 388. ". . . does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would, I think, be fraught with great danger": *per* Willes J. in the latter case.

EVIDENCE

s. 1(f)(ii)

Criminal Evidence Act, 1898, s. 1 (f) (iii) ?*—imputation on character of prosecution witness—cross-examination as to previous convictions—discretion of trial judge.*

R. v. Flynn

Court of Criminal Appeal: Slade, Ashworth, Paull, Salmon and Howard JJ.: [1961] 3 All E.R. 58.[5]

F. was convicted at quarter sessions of robbing X. of a sum of money. F.'s defence at the trial was that X. had made indecent overtures to him in a public lavatory, which he (F.) had repulsed, and that X. had handed the money to him voluntarily saying "Don't say anything to anyone about it." X. gave evidence to the effect that he had handed over the money to F., being put in fear, and F.'s defence was put to him in cross-examination. Counsel for the prosecution then submitted, in the absence of the jury, that he should be allowed to cross-examine F. as to his character and previous convictions. The recorder, having heard argument, ruled: ". . . as soon as he [Counsel for the defence] puts the accused into the witness box to tell that story on oath, that entitles the prosecution to say 'Right, you say the prosecutor is a man of bad habits, therefore the jury should be told the character you are.' In those circumstances, in my view anyhow, this evidence is admissible, and the previous convictions can be put to the accused." F. was accordingly cross-examined as to previous convictions for assault and wilful damage. On appeal to the Court of Criminal Appeal by certificate from the recorder:

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[5] For the appellant: *M. C. Parker* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *B. R. Clapham* (instructed by N. K. Cooper, Maidstone).

Held, allowing the appeal, that in view of the decisions in *R.* v. *Cook* [1959] 2 All E.R. 97 and *R.* v. *Brown*, 44 Cr.App.R. 181, it was clear that the evidence as to F.'s previous convictions was legally admissible under section 1 (*f*) (ii) of the Criminal Evidence Act, 1898. "The nature or conduct of the defence" was clearly such as to "involve imputations on the character" of X. However, the recorder had a discretion to exclude such evidence, although legally admissible if he thought fit. The question here was whether the recorder had brought his mind to bear on the issue whether it was desirable, having regard to the paramount consideration of having a fair trial, that the evidence should be admitted. This court had considerable doubt whether the recorder had addressed his mind to the question of discretion. It was to be observed that the recorder used the word "entitles" and the phrase: "In those circumstances . . . this evidence is admissible." Assuming, however, that he had exercised his discretion, this court was of the opinion that it had been wrongly exercised in principle. This court was slow to interfere with the exercise of a discretion and, of course, the exercise of a discretion must depend entirely upon the facts of the particular case. However, where the very nature of the defence necessarily involved an imputation against a prosecution witness the discretion should as a general rule be exercised in favour of the accused. If it were otherwise the accused would never be able to put forward any defence no matter how true, involving such an imputation without running the risk of his previous convictions being brought up. In the present case, the discretion should have been exercised so as to exclude the cross-examination as to previous convictions and, accordingly, the appeal would be allowed. [H. P.]

Commentary. The decision in *R.* v. *Cook* [1959] Crim.L.R. 358 seemed to have obviated the difficulties which had arisen in the construction of section 1 (*f*) (iii) of the 1898 Act, by removing the whole question from the sphere of law to that of judicial discretion. The present case seems, with great respect, to make the issue one of law once more and to restore all the old difficulties.

The court affirms that the question is one of judicial discretion but it then goes on to lay down a principle according to which the discretion must be exercised. This, though called by another name, is hardly distinguishable in effect from a rule of law. If it is wrong in principle to admit the cross-examination where the very nature of the defence involves an imputation against a prosecution witness, it seems to follow that a case such as *R.* v. *Hudson* [1912] 2 K.B. 464 was wrongly decided. There the prisoner's defence was that it was not he but one of the prosecution's witnesses who was the real thief, a defence which it was plainly impossible to advance without an imputation on a prosecution witness—and yet the Court of Criminal Appeal held that the prisoner was then properly cross-examined as to his character. But in *Cook* the Full Court said that "the difficulties created by this subsection are as a general rule best dealt with in accordance with the principle in *R.* v. *Hudson* as applied in *R.* v. *Jenkins*."

It is impossible not to sympathise with the view, expressed in the present case, which has forced the court to attempt to grapple again with the old difficulties, in the new form of principles for the exercise of a discretion rather than a rule of law. While the evidence is not inadmissible, the discretion should, as a general rule, be exercised in favour of the prisoner where the very nature of the defence necessarily involves an imputation for: "If it were otherwise, it comes to this, that the Act of 1898, the very Act which gave the charter so to speak, to an accused person to give evidence on oath in the witness-box, would be a mere trap because he would be unable to put forward any defence, no matter how true, which involved an imputation on the character of the prosecutor or any of his witnesses, without running the risk, if he had the misfortune of having a record, of his previous convictions being brought up in court while being tried on a wholly different matter."

It would now seem likely that the rape cases (*R.* v. *Sheean* (1908) 24 T.L.R. 459 and *R.* v. *Turner* [1944] K.B. 463) are not *sui generis* as was suggested in *Cook* but that they embody a general principle which governs the exercise of the judge's discretion.

The problem seems to be inescapable while section 1 (*f*) (iii) remains law. These difficulties of application are the best evidence of the unsatisfactory nature of the whole principle. *Cf.* Glanville Williams, *The Proof of Guilt* (2nd ed.), 186 *et seq.* Dr. Williams writes: "The survival of the rule, after half a century of criticism, is one of the most depressing examples of our failure to develop an adequate machinery for the revision of the law." The failure of the latest judicial attempt to get over the difficulties inherent in the subsection emphasises that the only adequate solution is a legislative one.

Proof of offence by circumstantial evidence alone

See FARRELL *v.* FEIGHAN, below, p. 629.

Road traffic—charge of causing death by dangerous driving—admissibility of evidence that accused had been drinking

See R. *v.* MCBRIDE, below, p. 625.

FOOD AND DRUGS

Food and Drugs Act, s. 8 (1) (b), (2) and (3)—tinned meat containing dead flies—onus of proof under section 8 (3)—whether charge brought under correct section

John Wilson & Co. (Foods) of York v. Thomas

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Salmon and Winn JJ.: (1961) 59 L.G.R. 264.[6]

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[6] For the manufacturers: *J. M. Pearson* (instructed by Herbert Smith & Co.); for the respondent: *W. G. Wingate* (instructed by Amery-Parkes & Co.; for William H. Hill & Co. of Altrincham.

M. purchased from a retailer a tin of steak in which she found two flies embedded in the meat. The tin was part of a consignment of tins of meat which had been supplied by the manufacturers to the retailers.

The manufacturers were charged with offences under s. 8 (1) (*b*) and s. 8 (2) of the Food and Drugs Act, 1955.

By section 8 (3) of the Act, it is provided that where a person is charged with an offence under section 8 (1) (*b*) " it shall be a defence for him to prove that, at the time when he delivered or dispatched it to that person, either it was fit for human consumption or he did not know, and could not with reasonable diligence have ascertained that it was unfit for human consumption."

The justices found that the meat was unfit for human consumption, that the flies had been present in the meat at the date of consignment to the retailer, and that although the manufacturers did not know of the presence of the flies, they could have ascertained it if they had exercised reasonable diligence. They convicted the manufacturers of an offence under section 8 (1) (*b*) and acquitted them of the offence under section 8 (2).

Held, allowing an appeal against conviction, that the onus, under section 8 (3) of the Act, was on the manufacturers to establish, on a balance of probabilities, that they could not have ascertained that the food was unfit for human consumption by the exercise of reasonable diligence during the period of manufacture, and not at the point of time at which the consignment was dispatched to the retailer, which was the time which the justices appeared to have contemplated; and that there was no evidence that the manufacturers could have ascertained at any time before the closure of the tins that the flies had entered and, accordingly, the justices had come to a decision not warranted by the evidence.

Per Lord Parker C.J.: " It is clear that where there has been a sale, section 8 (2) is the more appropriate provision." [D. C.]

Commentary. The sense in which the court thought the justices interpreted section 8 (3) is a not unnatural one; but the court held that it must be understood as if it read: " . . . was at the time when he dispatched it a person of whom it could be predicated that he had not then had an opportunity of ascertaining by reasonable diligence at any time before dispatch. . . ."

If the justices were really directing their minds to the question whether the manufacturers could have ascertained that there were two flies embedded in the meat in a sealed tin, their finding that they could was so perverse that, with respect, it seems hardly likely that this was the question they were considering. It is surely more likely that (as is also suggested by the court) they regarded the material question as being whether, by the exercise of reasonable diligence in conducting the processes of manufacture, the appellants could have *prevented* the entry of the flies.

This plainly is not the question which the Act requires them to answer—though perhaps it ought to be. A manufacturer may well adopt a negligent process which will, from time to time, result in his products being unfit for human consumption and yet have no opportunity of ascertaining by reasonable diligence that any particular item among his products is unfit. This seems to be the kind of situation the Act ought to cover. It should be noted that if a charge had been brought under section 2 (1) of selling to the prejudice of the purchaser any food not of the quality demanded by the purchaser, and the manufacturer had been joined by the seller under the provisions of section 113, he would have had no defence: *Lindley* v. *Horner* (1950) 66 T.L.R. (Pt. 1) 296.

Finally, it may be questioned whether the prosecution was properly brought under section 8 at all. In *J. Miller, Ltd.* v. *Battersea B. C.* [1956] 1 Q.B. 43; [1955] 3 All E.R. 279; [1955] Crim.L.R. 779, it was held that food does not become unfit for human consumption where " there is some piece of extraneous matter in the food which has no effect on the general composition." And see *Turner & Son, Ltd.* v. *Owen* [1956] 1 Q.B. 48; [1955] 3 All E.R. 565; [1955] Crim.L.R. 779. It is difficult to see that the two flies would have any more effect on the general composition of the food than the piece of metal in the *Miller* case or the piece of string in the *Turner* case; and, if they did not, it would seem that the prosecution should properly have been brought under section 2. (For a dictum to the effect that the presence of a dead fly in a bottle of milk did not make it unfit for human consumption under the *Miller* principle, see *Newton* v. *West Vale Creamery Co.* [1956] Crim.L.R. 415; 120 J.P. 318.) See " Fit for Human Consumption " [1956] Crim.L.R. 101.

If proceedings were properly brought under section 8, then it is respectfully agreed that the more proper charge, reading the section as a whole, is under section 8 (2).

GRIEVOUS BODILY HARM

Definition of the offence—mens rea—dictum in D. P. P. v. Smith

R. v. Metharam

Court of Criminal Appeal: Ashworth, Elwes and Thesiger JJ.: July 5, 1961.[7]

M. was convicted at the Central Criminal Court of wounding with intent to cause grievous bodily harm. The jury were directed on the question of what amounted to grievous bodily harm as follows: " Grievous bodily harm . . . is defined in the book as not necessarily either permanent or dangerous, but harm that seriously interferes with health or comfort. That is sufficient." On appeal to the Court of Criminal Appeal:

Held, that the jury had been directed in the terms of what could conveniently be called the old-fashioned definition of grievous bodily harm and without regard to the comments in the case of *D. P. P.* v. *Smith* [1961] A.C. 290. The issue in the present case was whether the injuries had been caused deliberately or accidentally and, as had been pointed out, it would have been open to the jury to find that there had been no intent to do grievous bodily harm, *i.e.*, really serious bodily harm. In the view of this court, as a result of the decision in *Smith's* case and certainly as applied to the facts of the present case, it was a misdirection to adopt the old formula and invite a jury to find a man accused of wounding with intent to do grievous bodily harm guilty if the only inetnt established was one to interfere seriously with health or comfort. However, on the facts of the present case it appeared that M. had attempted to strangle the girl in question and had drawn a knife which caused wounds resulting in seventeen stitches, accordingly, once the jury accepted the girl's evidence, a verdict of guilty of this offence was really the only verdict that a reasonable jury could reach. The proviso to to section 4 (1) of the Criminal Appeal Act, 1907, would be applied on the ground that no substantial miscarriage of justice had occurred and the appeal would be dismissed. [H. P.]

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[7] For the appellant: *A. C. L. Lewisohn* (instructed by G. Dowse & Co., Hackney). For the Crown: *R. I. S. Bax* (instructed by the Solicitor, Metropolitan Police).

Commentary. The direction given at the trial was based upon that of Willes J. in *R.* v. *Ashman* (1858) 1 F. & F. 88 and was the direction commonly in use, not only in charges under section 18, but also in murder cases (*cf. R.* v. *Vickers* [1957] 2 Q.B. 664; [1957] Crim.L.R. 614) before *D. P. P.* v. *Smith* [1960] Crim.L.R. 765. In the latter case Viscount Kilmuir said: " I confess that whether one is considering the crime of murder or the statutory offence, I can find no warrant for giving the words ' grievous bodily harm ' a meaning other than that which the words convey in their ordinary and natural meaning. ' Bodily harm ' needs no explanation, and ' grievous ' means no more and no less than ' really serious.' " This was clearly only a dictum with respect to the statutory offence but it was obviously one of great weight and it was to be expected that it would be followed by lower courts.

HABEAS CORPUS

Fugitive Offenders Act, 1881, s. 10—delay in bringing charges by the Indian authorities—whether unjust and oppressive to order accused's return to India.

R. v. Governor of Brixton Prison
Ex p. Singh

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Salmon and Edmund Davies JJ.: [1961] 2 W.L.R. 980.[8]

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[8] For the applicant: *Brian Leary* (instructed by Victor J. Lissack; For the Governor of Brixton Prison: *Mervyn Griffith-Jones* (instructed by Director of Public Prosecutions); For the Government of India: *T. O. Kellock* (instructed by T. L. Wilson & Co.).

In February 1961, an order was made by a metropolitan magistrate, under the Fugitive Offenders Act, 1881, committing S. to prison to await his return to India on charges of cheating, involving sums worth about £112. The offences were alleged to have been committed in India in 1951. S. had come to England in 1952, and had later been joined by his wife and child. In 1956 he obtained British nationality and surrendered his Indian passport. The depositions taken in India were not completed until 1956, and they were not authenticated until 1958. A warrant was issued in December 1958, authenticated in India in February 1959 and indorsed in London by the chief metropolitan magistrate in March 1960. S. was arrested in February 1961.

S. applied for a writ of habeas corpus, and made an application under section 10 of the Fugitive Offenders Act, 1881, on the ground that it would be unjust and oppressive to order his return to India in view of the long delay shown by the Indian authorities.

Held, allowing the application and ordering S.'s discharge, that on a true construction of section 10, the court had a wide discretion to do what was just, and that since S. had made a home and a life for himself in England, and would, by reason of the delay, inevitably experience difficulty in defending himself, the delay was of such a nature that it would be unjust and oppressive for S. to be returned to India. [D.C.]

Commentary. The case settles an important point of construction which has been raised on several previous occasions but has never required an actual decision. The narrow construction contended for would have permitted the court to order the release of an offender only on the ground of the triviality of the nature of the offence or on the basis that the application for the return of the offender was made in bad faith. This would have rendered meaningless the section's injunction to the court to have regard " to the distance, to the facilities for communication and to all the circumstances of the case." Observations in the previous cases support the present decision and it is respectfully submitted that it is clearly right.

HIGHWAYS

Highways Act, 1959, s. 121 (1)—obstruction by book-shelves in front of shop

Seekings v. Clarke

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Winn and Widgery JJ.: (1961) 59 L.G.R. 268.[9]

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[9] For the prosecutor: *Anthony Harmsworth* (instructed by Sharpe, Pritchard & Co. for F. H. Busby, Eastbourne).

A shopkeeper erected a sunblind in front of his shop. There were attached to the sides of the blind wire displays containing books. The wire display projected 2 ft. 6 ins. over the pavement, which was 16 ft. wide. The shopkeeper also placed wooden shelves containing books and other articles for sale on the pavement in front of the shop.

The shopkeeper was charged with wilfully obstructing the free passage along the highway, contrary to section 121 of the Highways Act, 1959. The justices dismissed the information.

Section 121 (1) provides: "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along the highway he shall be guilty of an offence and shall be liable in respect thereof to a fine. . . ."

Held, allowing an appeal by the prosecutor, that the projection on to the footway was a substantial one which prevented the public from having free access over the whole of the footway, and was a projection which was not purely temporary in nature: it was not a case to which the principle *de minimis* could be applied. [D. C.]

Commentary. The Lord Chief Justice expressed his full agreement with observations made by Black L.J. in *Black* v. *Mitchell* [1951] N.I. 145, in a case similar to the present, including the following: "Such practices, if kept within reasonable bounds, are not likely to be regarded by the public as causing any great inconvenience, unless the street is a busy one or the footpath a narrow one. In the vast majority of cases the ordinary citizen would be apt to regard a strict enforcement of the statutory provisions as unneighbourly and unnecessary, and calculated to produce an amount of ill-feeling out of all proportion to any good which might be achieved."

INDICTMENT

Duplicity—charge under Army Act, 1955, s. 70—Rules of Procedure (Army), 1956, r. 15

See R. *v.* NAISMITH, above, p. 608.

Indictments Act, 1915, s. 5 (1)—jurisdiction to allow amendment before arraignment by addition of count charging offence disclosed in depositions

R. v. Martin

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Lawton JJ.: [1961] 3 W.L.R. 17.[10]

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[10] For the appellant: *G. Green* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *M. Holdsworth* (instructed by Hand, Morgan & Owen, Stafford).

A bill of indictment was preferred against M., counts three and four of which alleged that he had obtained a motor-lorry and tyres by falsely pretending that two cheques were a good and valid order for the payment of the sum due. According to the depositions, the defendant had given only one cheque for the goods. At the trial, before the arraignment, the prosecution applied under section 5 (1) of the Indictments Act, 1915, to amend the indictment by the addition of another count, alleging the offence as disclosed in the depositions. The recorder allowed the application and the defendant was convicted on the added count. On appeal against conviction on the ground that the indictment had no effect in law since the recorder had no jurisdiction to allow the amendment:

Held, applying *R.* v. *Smith* [1951] 1 K.B. 53, that an indictment which charged an offence not disclosed in the depositions and failed to charge an offence which was so disclosed contained a latent defect which made it defective within the meaning of section 5 (1) of the Indictments Act, 1915, so that, although it was not a practice to be encouraged, there could be no objection in principle to the addition of another count provided that no injustice was caused to the defendant. Accordingly, the recorder had jurisdiction to allow the amendment and the appeal must be dismissed. [H. P.]

Commentary. The court expressed doubt whether a new count can be added at all after arraignment as the defendant will not have pleaded to it, nor, if the trial has started, been put in charge of the jury on it. A count can probably only be added before arraignment where the defence has had ample warning of the intention to apply; otherwise it is probable that the addition cannot be made without injustice.

JURISDICTION

Civil Aviation Act, 1949, s. 62 (1)—larceny in a British aircraft—interpretation of s. 62 (1).

R. v. Naylor

Central Criminal Court: Lord Parker C.J.: [1961] 2 All E.R. 932).[11]

N. was charged on indictment with larceny, contrary to section 2 of the Larceny Act, 1916, in that she, in a British aircraft in flight over the High Seas, stole three rings.

Before N. was put to plead, it was submitted on her behalf that the court had no jurisdiction to try her on this charge as it was not an offence known to English law.

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[11] For the Crown: *E. J. P. Cussen* and *S. A. Morton* (instructed by Director of Public Prosecutions). For N.: *Victor Durand, Q.C.*, and *J. C. G. Burge* (instructed by Turberville Smith & Co.).

Held, rejecting the submission, that by section 62 (1) of the Civil Aviation Act, 1949, any act or omission which would constitute an offence if done in England, was made an offence if done in a British aircraft, except where the act or omission was contrary only to legislation which was of purely domestic application; and therefore the court had jurisdiction to try N. [D. C.]

Commentary. The narrow construction contended for in this case was that section 62 (1) deals only with a matter of jurisdiction and venue and that it must first be found that, under English law, the acts complained of constitute offences if committed on a British aircraft. This would confine its operation to very few offences indeed—only murder, bigamy and offences under the Treachery Act, 1940, according to the court. The broader meaning adopted is in accordance with the views of Devlin J. expressed in *R.* v. *Martin* [1956] 2 Q.B. 272; [1956] Crim.L.R. 417.

LARCENY

Post Office Act, 1953, ss. 57, 87 (2) (b)—meaning of letter in the course of transmission by post

R. v. Hepburn

Court of Criminal Appeal: Lord Parker C.J., Winn and Widgery JJ.: February 27, 1961: 111 L.J. 308.[12]

H. was convicted at the Central Criminal Court of larceny of a postal packet contrary to section 57 of the Post Office Act, 1953. At the material time H. was a postman whose duty was to sort registered letters. The postal packet in question was a registered letter prepared by an investigating officer and it had been taken by a Post Office distributor to H. H. appealed to the Court of Criminal Appeal on the ground that this test letter was not a letter in the course of transmission by post within the meaning of section 57.

Held, dismissing the appeal, that the case plainly came within section 87 (2) (*b*) of the Act of 1953, which provided: " the delivery of a postal packet of any description . . . to an officer of the Post Office to be dealt with in the course of his duty shall be a delivery to a post office." This definition covered delivery by anybody to an officer of the Post Office and the letter in question was delivered to H. to be dealt with in the course of his duty. Until delivery to the addressee the letter was in the course of transmission by post. Accordingly, the appeal would be dismissed. [H. P.]

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[12] For the appellant: *S. N. Bernstein* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Tudor Price* (instructed by the Solicitor to the General Post Office).

OFFENSIVE WEAPON

Prevention of Crime Act, 1953, s. 1 (1) and (4)—meaning of " for causing injury to the person."

R. v. McMahon

Court of Criminal Appeal: Ashworth, Elwes and Thesiger JJ.: July 3, 1961.[13]

M. was separately indicted for the offences of rape and possessing an offensive weapon and convicted in both cases. In the first case the jury were directed on the question of consent that: " for a woman to consent in the proper sense of the word it must be a voluntary exercise of her will. If she is deprived by persistence, by some degree of force, or persuasion, then it cannot be said that she is consenting." In the second case the jury were directed on the question of what constituted an offensive weapon by reference to section 1 (1) and (4) of the Prevention of Crime Act, 1953, and as follows: " If the intention was to cause injury to this woman then that knife, which might very well be an innocent object and implement in the ordinary way, might easily be an offensive weapon." Reference was then made to " physical injury." Section 1 (1) of the Act of 1953 provides: " Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence." Section 1 (4) provides: " . . . ' offensive weapon ' means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him." On appeals to the Court of Criminal Appeal in each case:

Held, that the direction to the jury on the question of consent in the first case was so plainly wrong that this court had no alternative but to set aside the conviction for rape. In the second case, the alleged offensive weapon was an ordinary penknife, *i.e.*, a knife fitted with a single blade which was normally enclosed within a handle. The issue here was whether the words " for causing injury to the person " in section 1 (4) of the Act of 1953 necessarily involved the infliction of physical injury or the intention to inflict such injury on a person. The matter had been raised in *Woodward* v. *Koessler* [1958] 3 All E.R. 557; [1958] Crim.L.R. 754, in which it had been held that frightening or intimidating a person was "causing injury." In the present case the direction set a standard which was more favourable to the accused. In those circumstances, the appeal against the second conviction would be dismissed. [H. P.]

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[13] For the appellant: *R. J. Lowry* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *D. A. Jeffreys* (instructed by Penman, Johnson and Ewins).

Commentary. The interpretation of the Prevention of Crime Act is fully considered by Dr. Ian Brownlie in [1961] Crim.L.R. 19 and the point at issue in the present case is examined at pages 30–31.

RAPE

Meaning of consent—direction to jury

See R. *v.* McMahon, above, p. 622.

RECEIVING

Goods found on accused's premises—delivered during his absence—requirement of knowledge, or arrangement with the thief

R. v. Cavendish

Court of Criminal Appeal: Lord Parker C.J., Winn and Widgery JJ.: [1961] 1 W.L.R. 1083.[14]

C. was convicted at quarter sessions of receiving six barrels of oil. At the trial the evidence for the prosecution was that a lorry-driver, one L., took the barrels (which ought to have been delivered to a customer of his employers) to C.'s yard. The drums were unloaded by an employee of C., and L. at the same time took away seven empty barrels. C. was away at the time and the case for the prosecution was that the delivery of the oil must have been as a result of some arrangement between him and the thief. At the close of the prosecution's case, C. submitted that there was no case to answer. This submission was rejected. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that on the whole of the evidence the jury could perfectly properly have come to the conclusion that the case against C. had been made out. The sole question was whether a case had been made out at the close of the prosecution case which called for an answer. It was clear that for a man to be found to have possession, actual or constructive, of goods, something more must be proved than that the goods had been found on his premises. It must be shown either, if he was absent, that on his return he had become aware of them and exercised some control over them or that the goods had come, albeit in his absence, at his invitation or by arrangement. This court felt that the present case was rather a border-line one, but they had come to a clear conclusion that the submission had rightly been overruled. One only had to think of the answer to the question: "Why did L. deliver these goods to this yard and take away seven empties ? " to realise that there was certainly some evidence which made it more probable than not that the delivery was by arrangement with C. Accordingly the appeal against conviction would be dismissed.

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[14] For the appellant: *B. E. Capstick* (instructed by Victor Mishcon & Co.). For the Crown: *H. J. Leonard* (instructed by the Solicitor, Metropolitan Police).

[H. P.]

Commentary. The headnote to *R.* v. *Robinson* (1862) 26 J.P. 183 (which seems accurately to represent the decision of Martin B. in that case) reads: "The bare finding of stolen goods on the premises of the person indicted for receiving, without any evidence that they were left there by the thief in accordance with a previous arrangement between him and the receiver, will not be a sufficient confirmation of the evidence of the thief that they were so left to justify a conviction upon his otherwise unsupported evidence." The view that finding of stolen goods in these circumstances is not sufficient prima facie evidence of receiving is supported by *R.* v. *Savage* (1906) 70 J.P. 36; *R.* v. *Pearson* (1908) 72 J.P. 451; and *cf. R.* v. *Peach* [1960] Crim.L.R. 134.

For some purposes a man may be held to be in possession even though he is unaware of the existence of the thing possessed; but possession, as utilised by the courts is a variable concept, the precise nature of which differs according to the particular problem which requires solution: see *Towers & Co., Ltd.* v. *Gray* [1961] Crim.L.R. 408. *Cf. R.* v. *Cugullere* [1961] Crim.L.R. 410 where it was held that the words in the Prevention of Crime Act, 1953, "has with him in any public place" mean "*knowingly* has with him in any public place." Whether possession imports knowledge is a question of policy and, for the purpose of raising a prima facie case against an alleged receiver, it is respectfully submitted that the court rightly held that possession with knowledge is necessary.

ROAD TRAFFIC

Causing death by dangerous driving—admissibility of evidence that accused had been drinking—no charge of driving under the influence of drink—whether charge under Road Traffic Act, 1960, s. 1, may be coupled with charge under s. 6.

R. v. McBride

Court of Criminal Appeal: Lord Parker C.J., Slade, Ashworth, Paull and Salmon JJ.: [1961] 3 W.L.R. 549.[15]

M. was convicted at the Central Criminal Court of causing death by dangerous driving. The trial judge, after hearing argument, ruled that evidence as to M.'s condition and as to drink which he had consumed was admissible on the charge of causing death by dangerous driving. The indictment contained no count charging driving under the influence of drink, although the evidence was such as might have justified such a charge. M. appealed to the Court of Criminal Appeal, by certificate of the trial judge, on the main ground that evidence as to drink taken by a person accused only of dangerous driving was inadmissible in law as being irrelevant; such evidence might explain why a person drove dangerously but was irrelevant to the preliminary question whether he did so in fact, which must be considered objectively and not subjectively in relation to the particular driver.

Held, dismissing the appeal, that it was a well established principle that the proper test in cases of dangerous driving was the objective test, and juries were frequently invited to consider the matter from the point of view of an imaginary bystander. However, in some cases a bystander, however observant, would not be aware of all the circumstances relevant to the issue whether the accused was driving dangerously, for example, the driver's condition due to sleeplessness or drink. Dangerous driving might occur without a collision or any indication from the speed or movement of the vehicle that the driving of it was in the circumstances dangerous: see *Hill* v. *Baxter* [1958] 1 Q.B. 277. In the opinion of this court, the fact that a driver was adversely affected by drink was a circumstance relevant to the issue whether he was driving dangerously. Evidence to this effect was of probative value and was admissible in law. However, it should be noticed that the mere fact that the driver had had drink was not of itself relevant unless there was evidence that the amount of drink taken was such as would adversely affect a driver or had in fact adversely affected him. Further, the court had an overriding discretion to exclude such evidence if in its opinion the prejudicial effect of the evidence outweighed its probative value. The court ought to exercise its discretion to exclude such evidence unless it at least appeared to be of substantial weight. In the present case the trial judge had rightly exercised his discretion. Accordingly, the appeal would be dismissed.

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[15] For the appellant: *W. M. F. Hudson* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *R. D. L. Du Cann* (instructed by the Solicitor, Metropolitan Police).

This court had been asked to give some guidance on the question whether a charge under section 6 (driving when under influence of drink or drugs) should be preferred in addition to a charge of dangerous driving, assuming there was evidence to justify such additional charge. This court was of the opinion that an indictment charging an offence against section 1 (causing death by dangerous driving) should not include a charge under section 6. However, a charge under section 6 could properly be coupled with a charge under section 2 (dangerous driving) if the evidence regarding the influence of drink upon the driver was such as to justify it. [H.P.]

Commentary. The problem before the court in this case had been the subject of conflicting judicial rulings in *R.* v. *Richardson* [1960] Crim.L.R. 135 (where Elwes J. held that the evidence was admissible) and *R.* v. *Norrington* [1960] Crim.L.R. 432 (where Cassels J., apparently in the exercise of his discretion, declined to admit it). It was submitted in the commentaries on those two cases that evidence to the effect that an accused person has been drinking is so slightly relevant when the question is solely as to the manner in which he drove his car on a particular occasion that it ought to be excluded. Its only logical relevance is that persons who have been drinking are generally believed to be both more reckless and slower in reaction than when they have not been drinking; yet evidence as to a generally reckless disposition or as to the slowness of a person's reactions would not seem properly admissible evidence of how he acted on a particular occasion. The court seems to have got over that difficulty by taking a somewhat extended view of what is driving in "a dangerous manner." It would appear that a man is driving dangerously if he is in a sleepy condition, or knows that he is likely to have an epileptic fit even though he is succeeding in manoeuvring the car with perfect safety at the time. This conclusion seems to be justified by the observations (especially of Pearson J.) in *Hill* v. *Baxter* [1958] 1 Q.B. 277; [1958] Crim.L.R. 192, and the decisions in *Kay* v. *Butterworth* (1945) 110 J.P. 75 and *Henderson* v. *Jones* [1955] Crim.L.R. 258. It is, however, inconsistent with *Edwards* v. *Clarke* (1951) 115 J.P.J. 426, which appears to require some evidence of the manner of driving prior to falling asleep. Since, however, *Edwards* v. *Clarke* has been declared by the Divisional Court to be "a case depending on its own special facts" which was "never reported and rightly so" (*The Times*, March 8, 1955), it is clear that it should not be followed. See *R.* v. *Sibbles* [1959] Crim.L.R. 660.

If it is dangerous driving to drive having taken so much drink "as would adversely affect a driver" it is as clear as anything could be that evidence must be admissible to show that the accused took so much drink as would adversely affect a driver. Where, however, the essence of the prosecution's case is that the accused executed a dangerous manoeuvre (which, surely, is almost invariably the case) and this is denied, the introduction of evidence that the accused has been drinking is, as has been previously submitted, but slightly relevant and highly prejudicial.

Driving in a manner dangerous—mechanical defect in car—onus of proof—facts peculiarly within the knowledge of the accused

R. v. Spurge

Court of Criminal Appeal: Lord Parker C.J., Hilbery, Gorman, Salmon and Stevenson JJ.: [1961] 3 W.L.R. 23.[16]

S. was convicted at quarter sessions of driving a motor-vehicle in a manner dangerous to the public. S.'s evidence at the trial was that he had taken delivery of the vehicle in question a few days before the alleged offence; that he had noticed during the drive home that the vehicle had a slight tendency to pull to the right on braking; that on the day of the alleged offence he had applied the brakes somewhat vigorously on approaching a bend, and, due to their faulty condition, the vehicle was pulled on to the wrong side of the road in such a fashion that it was impossible to control it; and that he was not guilty of the offence because the danger created by his vehicle was due solely to the defect in its brakes and was in no way attributable to the manner in which he was driving. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that a mechanical defect in a motor-vehicle might be a defence to a charge of dangerous driving if it caused a sudden total loss of control and was in no way due to any fault on the part of the driver, but such defence had no application where the defect was known to the driver or should have been discovered by him had he exercised reasonable prudence. The onus of establishing such a defence did not rest on the accused; it would not be considered by the court unless raised by the accused, but once raised, it had to be considered with the rest of the evidence and the onus of proof still remained on the prosecution. In the present case, even if the jury had accepted the whole of the defence evidence it would still have been their duty to convict for it was clearly dangerous for S. to have driven his vehicle as he did with the knowledge which he possessed. Accordingly, the defence had not been made out and the appeal would be dismissed. [H. P.]

Commentary. This is an important decision in several respects.

1. It confirms that dangerous driving is an offence requiring negligence and is not an offence of "absolute prohibition" in the strict sense, though it has sometimes been so described (*per* Lord Goddard C.J. in *Hill* v. *Baxter* [1958] 1 Q.B. 277; [1958] Crim.L.R. 192). It follows that the accused should be acquitted, notwithstanding that his

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[16] For the appellant: *A. K. Twaddle* (instructed by Lesser & Co.). For the Crown: *H. J. M. Tucker* (for *Robert Hughes*) (instructed by Stokes, Neville-Smith & Crabb, Portsmouth).

car executed a dangerous manoeuvre, if it appears that he was exercising that degree of care and skill which a reasonable and prudent driver would exercise. *Cf. R.* v. *Johnson* [1960] Crim. L.R. 430 and commentary thereon:

2. It makes it clear that the onus of proof is on the Crown throughout. The point was left open by the majority in *Hill* v. *Baxter*, where Lord Goddard C.J. held that, when it was proved that the car was driven in a dangerous manner, there was an onus on the accused to prove, on a balance of probabilities, that he was not responsible because he had had an unforeseeable blackout, been attacked by a swarm of bees, etc. Devlin and Pearce JJ., who expressly reserved the point, seemed inclined to the view that, in such a case, the only burden on the prisoner was the evidential one of introducing so much evidence as might raise a doubt in a jury's mind. This view is in accordance with general principle and its adoption in the present case is, with respect, to be welcomed.

3. It lays down that there is no rule of law that, where facts are peculiarly within the knowledge of the accused, the burden of establishing any defence based on those facts is on him. It has more than once been pointed out in these commentaries that such a rule would be inconsistent with the well-established *Woolmington* principle that the onus of disproving the defences of provocation, accident, self-defence, etc., is on the Crown; and this point is taken in the present case. The implication of the present case seems to be that even on facts such as those in *R.* v. *Turner* (1816) 5 M. & S. 206 and *John* v. *Humphreys* [1955] 1 W.L.R. 325; [1955] Crim.L.R. 320, the only burden on the prisoner is an evidential one. This is the view contended for by Dr. Glanville Williams, *The Criminal Law, The General Part*, § 230, and, again, would be in accord with general principle.

Driving without due care and attention—possibility that accused had suffered a dizzy spell—a "fanciful" doubt

Oakes v. Foster

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Hilbery, Gorman, Salmon and Stevenson JJ.: *The Times*, April 19, 1961.[17]

F. was charged with driving a motor-cycle without due care and attention, contrary to section 12 of the Road Traffic Act, 1930.

The justices found that at about 8 p.m. on May 26, 1960, F. was riding his motor-cycle along a road from Prestatyn in the direction of Chester. He was driving at a fairly fast speed and had to negotiate a sharp left-hand bend. At the beginning of the bend the motor-cycle mounted its nearside kerb, travelled 121 ft. in a curve along the footpath, and then travelled straight for 101 ft. in a diagonal direction across the road colliding with a car coming in the opposite direction.

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[17] For the prosecutor: *Ronald Waterhouse* (instructed by Sharpe, Pritchard & Co., for Mr. W. Hugh Jones, Mold). F. did not appear and was not represented.

The justices were of opinion that there was a reasonable doubt as to whether or not something had happened before the collision which had caused F. to lose control, and in particular whether or not he had suffered a dizzy spell; and they dismissed the information.

Held, allowing an appeal by the prosecutor, that on the face of it, the case was one for applying the objective test: the justices' doubt was a fanciful doubt, and they could only have come to one conclusion, which was that the offence had been proved.

Per Lord Parker C.J.: In these circumstances it is unnecessary to consider the circumstances which ought to excuse a defendant who did suffer from a dizzy spell, or who was deprived of control by a low flying bird or a stone or some other circumstance. [D. C.]

Commentary. When it has once been proved that a car with the accused at the controls travelled on the road in a dangerous manner, there is an onus on him, not to prove anything, but to introduce so much evidence as might raise a doubt in the mind of a reasonable jury: *R.* v. *Spurge*, above, p. 627. If he fails to introduce so much evidence and there are no circumstances which might raise a doubt as to his responsibility, then it is the duty of the magistrates to convict. *Cf.* the leading case of *Hill* v. *Baxter* [1958] 1 Q.B. 277; [1958] Crim.L.R. 192, where the defence of "blackout" or automatism similarly failed.

Road Traffic Act, 1930, s. 12—inference of careless driving from circumstances of accident—identification of driver

Farrell v. Feighan

Sheriff Court of Lanarkshire: (1960) 76 Sh.Ct.Rep. 141.[18]

In a summary prosecution for careless driving the only evidence was that F., the owner of a motor-vehicle, was found lying seriously injured beside his vehicle which had mounted the pavement and collided with a pillar.

Held, that the owner had been sufficiently identified as the driver but there was insufficient proof of negligence for conviction.

Commentary. It is permissible to prove a crime by the evidence of circumstances alone: for example *H.M. Advocate* v. *Rolley*, 1945 J.C. 155 (palm prints). But the circumstances must be such as to yield only the inference of crime. The onus is on the Crown to prove their case and no inference of guilt is to be drawn from the accused's failure to give evidence: *Alexander* v. *Adair*, 1938 J.C. 28. As the accused chose not to testify, the possibilities of obstructions in the road, head injury or illness of the accused could not be eliminated and the case failed.

[Report and commentary by ALISTAIR R. BROWNLIE, S.S.C.]

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[18] For the prosecutor: *Party*. For the accused: William Armour & Sons, Solicitors, Glasgow.

TRIAL

Accused unrepresented—disclosure that he had been in prison—duty of judge to inform accused of his right to ask for the trial to be stopped

R. v. Lomas

Court of Criminal Appeal: Ashworth, Elwes and Thesiger JJ.: July 3, 1961.[19]

L. was convicted at quarter sessions of receiving. On two occasions during the course of the trial questions were asked which disclosed the fact that L. had been in prison. L., who was not represented, did not ask for the trial to be stopped nor was he informed of his right to apply for the jury to be discharged. On appeal to the Court of Criminal Appeal:

Held, following *R.* v. *Featherstone* (1942) 28 Cr.App.R. 176, that, in a case where a prisoner was not represented and an irregularity took place (for example, by an inadvertent disclosure such as in the present case), it was the duty of the trial judge to inform the prisoner that he had a right to submit that the trial should not proceed before that jury. It was then for the court to decide as a matter of discretion whether or not the application should be granted. There was a manifest irregularity in the present case because L. had not been informed of his right. However, this was a plain case and, on the facts, it would have been almost unreasonable for any jury to have acquitted him. In those circumstances the proviso to section 4 (1) of the Criminal Appeal Act, 1907, could be applied on the ground that no substantive miscarriage of justice had actually occurred and the appeal would accordingly be dismissed. [H. P.]

Common Law Procedure Act, 1865—accused unrepresented—comments by accused to jury from witness box after cross-examination.

R. v. Berry

Court of Criminal Appeal: Ashworth, Paull and Elwes JJ.: June 27, 1961.[20]

B. was convicted at assizes of rape. The issue on the facts was whether or not he had had intercourse with the girl in question.

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[19] For the appellant: *C. R. Oddie* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. H. Lord* (instructed by J. Arnold Brierley and Robinson, Oldham).

[20] For the appellant: *D. Q. Miller* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *S. J. Wilson Price* (instructed by the Director of Public Prosecutions).

B. was not legally represented at the trial, although he was twice offered the assistance of counsel. At the conclusion of B.'s cross-examination, whilst he was still in the witness box, the trial judge asked him whether there was anything further he wished to say. B. replied: "Not in the form of evidence but in the form of comment," and he then made some comments to the jury. The trial judge, having put four further questions to him, told B. to go back to the dock and then summed up. B. appealed to the Court of Criminal Appeal on the main ground that he had not been given any opportunity to address the jury in the form of a speech and that, accordingly, the trial was vitiated.

Held, dismissing the appeal, that by virtue of the provisions of the Common Law Procedure Act, 1865, a defendant, whether represented by counsel or not, had a right to sum up the evidence to the jury. The usual practice, in the case of a man who was not represented, was for the court to inform him of his right to give evidence on oath and to address the jury from the dock. If he chose to give evidence on oath, he was warned that he accepted the risk of cross-examination and, at the conclusion of his evidence, he was informed that he was at liberty to say anything further by way of comment to the jury. This was a perfectly proper practice. In the present case B. had not been invited to address the jury on his return to the dock. However, if there was any irregularity at all (which this court did not accept) it was one of a very minor character because it was plain that B. had taken advantage of an opportuuity specifically afforded to him by the trial judge to say anything further to the jury; and the fact that he made these comments from the witness box rather than from the dock was certainly not such an irregularity as would justify or compel this court to interfere with the verdict. Accordingly, the appeal would be dismissed. [H.P.]

Direction to jury on burden of proof—no reference to "satisfy," "sure" or "reasonable doubt"

R. v. Deans, Langford, Lewsam and Ward

Court of Criminal Appeal: Ashworth, Thesiger and Megaw JJ.: July 10, 1961: *The Times*, July 11, 1961.[21]

The appellants were convicted at quarter sessions of shopbreaking and larceny. On the question of the burden of proof the jury were directed: ". . . the most essential injunction for the jury to remember is that any man tried for a criminal offence in this country can be convicted by the evidence adduced by the prosecution alone. It may be, of course, that he makes admissions in cross-examination, and so forth, but essentially the guilt of a man must be determined by the case of the prosecution. It is upon the prosecution's case and the evidence they adduce that you say whether these men are guilty or not. It is for the prosecution to prove this case and these men's guilt. You are the judges of fact and upon your opinion the whole case depends." On appeal to the Court of Criminal Appeal:

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[21] For the appellants: *P. M. Blomefield* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. K. Wood* (instructed by Messrs. T. W. Stuchbery & Son, Maidenhead).

Held, allowing the appeals, that the matter of the burden of proof had been treated somewhat cursorily in the summing-up. No reference had been made to "satisfy," "sure" or "reasonable doubt." On any view there was a formidable case against the appellants but, since on a proper direction one or more of them might have been acquitted, this court did not feel that this was a proper case for the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907 (on the ground that no substantial miscarriage of justice had actually occurred). With some reluctance, therefore, the appeals would be allowed. [H. P.]

Commentary. See [1961] Crim.L.R. 111, 282, 322–324, 560–563. Further comment seems superfluous.

Indictment—amendment of before arraignment—jurisdiction to allow amendment

See *R.* v. MARTIN, above, p. 619.

Interventions by chairman—cross-examination of accused and defence witnesses by chairman

R. v. Fer

Court of Criminal Appeal: Ashworth, Elwes and Thesiger JJ.: July 4, 1961.[22]

F. was convicted at Middlesex Quarter Sessions of driving when unfit to drive through drink or drugs. She appealed to the Court of Criminal Appeal upon a ground framed as follows: "That throughout the evidence the learned chairman constantly intervened in favour of the prosecution and against the defence in such a way as to prevent the defence case from being properly or adequately put before the jury."

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[22] For the appellant: *Edward L. Gardner, Q.C.*, and *B. J. Wakely* (instructed by J. Tickle & Co.). For the Crown: *R. I. S. Bax* (instructed by the Solicitor, Metropolitan Police).

Held, allowing the appeal, that there had been ample evidence at the trial to support the conviction. However, this court had considered the transcript of this trial with considerable disquiet. It appeared that there had been no less than seventy interruptions from the bench during the evidence. These interruptions fell into three categories, first, interruptions of defending counsel, secondly, interruptions of the defendant and, thirdly, interruptions of witnesses called for the defence. As to the first category, it was right to say that counsel appearing for the defence in a criminal case must sometimes expect to argue his case before an unsympathetic court. There were, however, limits and the learned chairman overstepped those limits in this case ; his interruptions of defending counsel were quite uncalled for and some of them were couched in contemptuous language. Discourtesy to counsel would not, however lamentable, ordinarily lead this court to interfere with a verdict. As to the second category, it had been common ground at the trial that F. was suffering from an anxiety neurosis. In those circumstances, one would have hoped for consideration from the bench, not only because courtesy would prompt consideration for a witness who was not in good health but also so that, in the general interests of a proper trial, a witness should be given conditions under which her evidence could be received without difficulty and given without restraint. Unhappily, the learned chairman showed very great impatience with F. ; he interrupted her on many occasions, showed great discourtesy and cross-examined her in a hectoring fashion. His conduct in this respect was not tolerable. As to the third category, two medical witnesses were called for the defence. Whilst it was true that such witnesses were often perfectly well able to take care of themselves and were sometimes accustomed to rough treatment either from counsel or even from the bench, the learned chairman here again overstepped the mark. He not only cross-examined these witnesses unfairly but more than once created confusion which was not resolved. The conduct of this trial was so unsatisfactory that it could only be regarded as a mistrial. Accordingly, the appeal would be allowed and the conviction quashed. [H. P.]

Commentary. *Cf. R.* v. *Edwards*, below, p. 634, and commentary thereon.

Interventions by judge showing adverse view of defence case—strong case against accused—principle to be applied on appeal

R. v. Edwards

Court of Criminal Appeal: Ashworth, Paull and Elwes JJ.: June 26, 1961: *The Times*, June 27, 1961.[23]

E. was convicted at a Crown court of stealing and obtaining a valuable security by false pretences. On appeal to the Court of Criminal Appeal on the ground that throughout the trial the recorder had indicated his adverse view of the defendant, frequently interrupted and made it difficult for defending counsel to place the defence before the jury:

Held, allowing the appeal, that this court was faced with a choice between two evils. If the conviction was allowed to stand, E. might rightly consider that he had been deprived of that priceless asset which should be afforded to all accused persons—a fair trial. If the conviction were quashed there was strong ground for supposing that dishonesty would, in this instance, have escaped punishment. This court felt that the most important factor was the maintenance of fairness and impartiality on the part of the judge and both these qualities had been absent at this man's trial. Accordingly, the appeal would be allowed. [H. P.]

Commentary. "The first and most important thing for the criminal law is that it should appear that the prisoner is having a fair trial and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury": *per* Lord Goddard C.J. in *R.* v. *Clewer* (1953) 37 Cr.App.R. 37.

This may well be another of those "Many cases . . . of a conviction that has been quashed in the case of a man who is obviously guilty simply because a rule that is necessary for the good administration of criminal justice has been infringed": Devlin, *The Criminal Prosecution in England*, 37. It again emphasises the need for the Court of Criminal Appeal to be given power to order a new trial. *Cf. R.* v. *Oliva* [1961] Crim.L.R. 111 and commentary thereon and *R.* v. *McKenna and Others* [1960] 1 Q.B. 411; [1960] Crim.L.R. 210.

Separate trials—statements by accessories implicating principal—judicial discretion—principle to be applied

R. v. Buggy

Court of Criminal Appeal: Ashworth, Elwes and Thesiger JJ.: July 4, 1961.[24]

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[23] For the appellant: *Miss I. Bernstein* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *I. H. Morris Jones* (instructed by the Prosecuting Solicitor, St. George's Hall, Liverpool).

[24] For the appellant: *C. L. Hawser, Q.C.*, and *J. Richards* (instructed by T. W. James & Mallows). For the Crown: *Mervyn Griffith-Jones* and *J. C. Mathews* (instructed by the Director of Public Prosecutions).

B. was convicted at the Central Criminal Court of assault occasioning actual bodily harm and of shooting with intent to do grievous bodily harm. Two other men were charged with being accessories after the fact to shooting and were tried together with B. These two men had made statements containing an unqualified admission by B. that he had been responsible for the shooting. B.'s counsel applied to the trial judge for separate trials, but the application was refused. B. appealed to the Court of Criminal Appeal on the main ground that the trial judge was wrong in refusing to order separate trials.

Held, dismissing the appeal, that the principles to be applied to the question of separate trials were those laid down in *R.* v. *Grondkowski* (1946) 31 Cr.App.R. 116. It was true that in that case there was a joint indictment of two men as principals but, in the opinion of this court, the same principles applied to a case where two men were indicted as principal and accessory before or after the fact. Lord Goddard C.J. said in that case: " The law is, and always has been, that this is a matter of discretion for the judge at the trial . . . The discretion, no doubt, must be exercised judicially, not capriciously. The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that ' the interests of justice ' means only ' the interests of the prisoners.' If once it were taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it. There is no case in which this has ever been laid down, and in the opinion of the court it would be most unfortunate and contrary to the true interests of justice if it were." This being a matter of discretion, this court would only interfere if satisfied that the trial judge proceeded upon some wrong principle. The argument for and against separate trials had been fully and carefully presented and had undoubtedly been carefully considered by the trial judge, although he had not thought it necessary to give detailed reasons for his decision. So far from being satisfied that the trial judge had proceeded upon wrong principles, this court was of the opinion that he had been right to refuse separate trials. Accordingly, the appeal would be dismissed. [H. P.]

Commentary. For some interesting observations by Devlin J. on the problem of ordering separate trials, see *R.* v. *Miller* (1952) 36 Cr.App.R. 169 at 173–175 where illustrations are given of how the ordering of separate trials might result in a miscarriage of justice. See also Glanville Williams, *The Proof of Guilt* (2nd ed.), 210 *et seq.*

Summing-up—whether judge should go through the evidence

R. v. Attfield

Court of Criminal Appeal: Ashworth, Thesiger and Megaw JJ.: [1961] 1 W.L.R. 1135.[25]

A. was convicted at quarter sessions of indecent assault on, and gross indecency with, two young boys. He appealed to the Court of Criminal Appeal on the main ground that the recorder had not dealt with the evidence in summing-up:

Held, dismissing the appeal, that, whilst this court did not approve of the course taken in the present case, the fact that the recorder had not summarised the evidence in his summing-up to the jury was not a fatal defect. No doubt it was right to say that probably nine times out of ten the trial judge in a summing-up did go through the evidence. It would be quite wrong to suggest that it was the duty of the trial judge to read out the whole of the evidence. In most cases the judge endeavoured to direct the jury by reference to the salient features of the evidence for and against the accused. No case laid down that it was essential for the validity of the summing-up that there should be a reference to the evidence; but, similarly, there was no case which absolved the court from its normal function of assisting a jury by dealing with the evidence. The circumstances of the case might demand that the judge should deal with the evidence but, as was said in *R.* v. *Stoddart* (1909) 2 Cr.App.R. 217 at p. 264, each case depended on its own facts. In a lengthy and complicated case it would be incumbent upon a court to deal with the evidence; but in a case which had not occupied a great deal of time and the issue of guilt or innocence had been clearly stated, this court was not prepared to hold that it was a fatal defect that the evidence was not discussed. In the present case, it would have been very much better if the recorder had summarised the evidence in his summing-up. However, in the circumstances, the appeal would be dismissed. [H. P.]

Commentary. "The act of stating for the jury the questions which they have to answer and of stating the evidence bearing on those questions and showing in what respects it is important generally goes a considerable way towards suggesting an answer to them, and if a judge does not do as much at least as this he does almost nothing": Stephen J., *History of the Criminal Law*, i, 455. The right and duty of the English judge to sum up and comment on the evidence has been thought to be a very valuable factor in securing the proper conduct of a trial. See Camb.L.J. (1955), 80 *et seq.* and *R.* v. *Mitchell and Jones* [1960] Crim.L.R. 211.

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[25] For the appellant: *H. J. M. Tucker* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. H. Inskip* (instructed by the Town Clerk, Portsmouth).

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Bigamy

In R. *v.* HAWCROFT the court (Slade, Havers and Sachs JJ.: July 24, 1961) upheld a sentence of two years' corrective training imposed for bigamy. H. was separated from his lawful wife and was living with another woman when he met the girl whom he bigamously married. He had two previous convictions for dishonesty, one for driving whilst uninsured and two for driving whilst disqualified. Slade J., giving judgment, said that it was no doubt only in rare cases of conviction for bigamy that corrective training was an appropriate sentence. However, in view of the circumstances of the present offence, it was impossible to say that the trial judge erred in principle in passing such a sentence.

Breaking and entering

In R. *v.* STEPHENS the court (Lord Parker C.J., Streatfeild and Ashworth JJ.: December 15, 1960) refused leave to appeal against a sentence of three years' corrective training. S. had pleaded guilty to breaking and entering a health clinic and stealing £2 5s. S., who was a man of twenty-nine years of age, had four previous convictions. The present offence was committed only two days after his last release from prison. The prison commissioners reported that S. was a man of weak intellect, inadequate and apathetic, and that he might benefit from corrective training, for which he was mentally fit. The court stated that, in their opinion, the sentence was a perfectly correct one.

Conspiracy

In R. *v.* KROGER AND OTHERS the court (Hilbery, Pilcher and Paull JJ.: May 9, 1961) upheld sentences of twenty-five, twenty and fifteen years' imprisonment imposed upon the appellants for conspiracy to contravene section 1 of the Official Secrets Act, 1911. Hilbery J., delivering judgment, said that the sentence for conspiracy was, of course, at large but it had been submitted on behalf of the appellants that if they had been convicted of a single substantive offence under the Act of 1911 the maximum sentence would have been fourteen years. However, this was not a case of any single act done by any of the appellants. It had been alleged and proved that each of them was one of a criminal combination existing, organised and elaborately equipped for transmitting information to a potential enemy as often as it had such information to give. There was nothing wrong in principle with the sentences in this case.

In R. *v.* STANFORD AND OTHERS the court (Ashworth, Elwes and Thesiger JJ.: July 5, 1961) held that, where a man was convicted of conspiracy and of other offences which were in effect overt acts in the conspiracy, concurrent sentences should be imposed. Although different charges were sustainable in regard to one set of facts, the sentences imposed therefor should be concurrent and not consecutive.

Larceny

In R. *v.* BRODIE the court (Pilcher, Gorman and Megaw JJ.: May 19, 1961) varied a sentence of twelve years' preventive detention to one of probation. The sentence was imposed for the larceny of a jacket worth £1 and other property worth £10 18s. A Mr. T. (an after-care officer) told the court that he was sure he could help the appellant and was prepared to take him to his home in Wales for the Whitsun holiday; thereafter he would try to find him lodgings and a job. The court stated that the appellant owed the course which they were going to take entirely to Mr. T.; and the court would substitute a probation order for three years for the sentence of preventive detention.

*Acts and Orders**

Agricultural Employment

The repeal of the Chaff-Cutting Machines (Accidents) Act, 1897 (60 & 61 Vict. c. 60), takes effect on July 14, 1961, and the repeal of the Threshing Machines Act, 1878 (41 & 42 Vict. c. 12), takes effect on August 1, 1961. The repeal of these Acts was made prospectively by section 7 (1) of the Agriculture (Safety, Health and Welfare Provisions) Act, 1956; and the dates of repeal now provided for are those on which provisions of the Agriculture (Stationary Machinery) Regulations, 1959 (S.I. 1959, No. 1216), and the Agriculture (Threshers and Balers) Regulations, 1960 (S.I. 1960, No. 1199), corresponding to the repealed Acts, came into operation. CHAFF-CUTTING MACHINES (ACCIDENTS) ACT, 1897, and THRESHING MACHINES ACT, 1878 (REPEAL) (APPOINTED DAY) ORDERS, 1961 (S.I. Nos. 1108 and 1109) (each 2d.).

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* Prepared by F. Maurice Drake, Barrister-at-Law.

Auctions

MOCK AUCTIONS ACT, 1961 (9 & 10 Eliz. 2, c. 47). This Act makes it an offence to promote or conduct, or to assist in the conduct of, a mock auction at which one or more lots of a nature specified in the Act are offered for sale (s. 1). The lots specified in the Act are any lot consisting of or including one or more "prescribed articles," which term comprises any plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of personal or household use or ornament or any musical or scientific instrument or apparatus (s. 3). A "mock auction" within the meaning of the Act is any sale of goods by way of competitive bidding if, but only if, during the course of the sale (a) any lot to which the Act applies (as specified in section 3, see above) is sold to a person bidding for it, and either it is sold to him at a price lower than the amount of his highest bid for that lot, or part of the price at which it is sold to him is repaid or credited to him or is stated to be so repaid or credited, or (b) the right to bid for any lot to which this Act applies is restricted, or stated to be restricted, to persons who have bought or agreed to buy one or more articles, or (c) any articles are given away or offered as gifts (s. 1 (3)). There are saving provisions to exclude genuine reductions in price or repayments or credits where defects are discovered or damage is sustained (s. 1 (4)). Where an offence under the Act committed by a body corporate is proved to have been committed with the consent or connivance or to be attributable to any neglect on the part of any director, manager, secretary or similar officer of the body corporate or anyone purporting to act in that capacity, then that person shall be deemed to be guilty of the offence and liable to be punished accordingly (s. 2). The penalties for offences are: (i) on summary conviction a fine not exceeding £100 or imprisonment for up to three months, or both; and (ii) on conviction on indictment a fine not exceeding £1,000 or imprisonment for up to two years, or both (s. 1 (2)). The Act comes into operation August 27, 1961.

Customs and Excise Prosecutions

FINANCE ACT, 1961 (9 & 10 Eliz. 2, c. 36). Section 11 of this Act provides that a local authority in England and Wales may authorise the bringing by any constable of proceedings relating to any duty the levying of which has been transferred to the authority under the Finance Act, 1908 (8 Edw. 7, c. 16) (relating to licences for dealing in game, killing game and guns), and the Finance Act, 1949 (12, 13 & 14 Geo. 6, c. 4) (relating to hawkers', moneylenders', pawnbrokers' and refreshment house licences). These provisions became operative July 19, 1961, when the major part of the Act came into operation.

Diplomatic Immunity

Various Orders relating to diplomatic immunities for officials of the Republic of Ireland and Commonwealth countries are consolidated, with additions relating to Nigeria. The Order confers on persons for the time being holding any of the offices or classes of offices described in the Schedule to the Order the like immunity from suit and legal process and the like inviolability of official archives as are accorded to consular officers of a sovereign Power, and restricts powers of entry into the official premises of such persons. Operative July 1, 1961. COMMONWEALTH COUNTRIES AND REPUBLIC OF IRELAND (IMMUNITIES) ORDER, 1961 (S.I. No. 1194) (3d.).

Factories

A new form of precautionary leaflet which is to be supplied to every machinery attendant to whom the Operation of Unfenced Machinery Regulations, 1938 (as amended), applies is prescribed by this Order. The new form of leaflet is in substitution for that prescribed by an Order of the Minister of Labour, dated January 9, 1952. Operative July 5, 1961. UNFENCED MACHINERY (PRESCRIBED LEAFLET) ORDER, 1961 (S.I. No. 1106) (3d.).

The Breathing Apparatus, Etc. (Report on Examination) Order, 1949 (S.I. 1949, No. 189), which prescribed particulars to be contained in the report on an examination of any apparatus, belts or ropes for the purposes of section 27 (6) of the Factories Act, 1937 (as re-enacted by section 6 of the Factories Act, 1959), is revoked and replaced by this Order which contains similar provisions. Operative August 1, 1961. BREATHING APPARATUS, ETC. (REPORT ON EXAMINATION) ORDER, 1961 (S.I. No. 1345) (3d.).

Highways

Variation is made in the classes of traffic for the purposes of the special roads specified in Schedule IV to the Highways Act, 1959 (7 & 8 Eliz. 2, c. 25); the similar Order made in 1959 (S.I. 1959, No. 1280) is revoked. Operative June 30, 1961. SPECIAL ROADS (CLASSES OF TRAFFIC) ORDER, 1961 (S.I. No. 1210) (3d.).

Juvenile Courts

New forms are prescribed for use by juvenile courts, in particular in cases where sections 60 and 61 of the Mental Health Act, 1959, apply. Operative October 2, 1961. SUMMARY JURISDICTION (CHILDREN AND YOUNG PERSONS) RULES, 1961 (S.I. No. 1421) (4d.).

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 1137 (Poplar) (2d.); 1150 (Croydon) (3d.); 1160 (Croydon) (2d.); 1171 (City of London) (3d.); 1278 (Westminster) (2d.); 1287 (Hendon) (2d.); 1328 (City of London) (3d.); 1346 (Shoreditch) (3d.); 1352 (Heston and Isleworth) (2d.). The following Order has been made revoking a previous Order (S.I. 1955, No. 884) detailing prescribed routes: S.I. No. 1286 (2d.).

The following Orders have been made prohibiting waiting: S.I. Nos. 1233 (Hertford) (2d.); 1244 (Sevenoaks) (3d.).

The following Orders impose a speed limit of 40 m.p.h. on certain roads in the London Traffic area: S.I. Nos. 1138 (part of the London–Brighton (A.23) Trunk Road, Croydon) (2d.); 1354 (part of the Chiswick–Hanworth Road (A.316), in the Borough of Richmond and Twickenham) (3d.).

The following Order has been made placing restrictions on the driving of certain vehicles along certain roads: S.I. No. 1353 (Shoreham) (2d.).

The following Order has been made restricting the use of certain roads by vehicles over a certain weight: S.I. No. 1317 (Great Paindon, Essex) (3d.).

Parking meters are to be introduced in the County Borough of Croydon. The location of these parking meters is described in the Schedule to the Order, and the Order provides for the times and days during which the meters are to be in operation, the types of vehicles which may be parked there, the periods for which the vehicles may be left there and the charges which the Croydon Council are empowered to make and the general method of operation of the system. Operative for preliminary purposes, to enable the council to carry out the necessary works and acquire the sites, on July 1, 1961, and for all other purposes on October 2,

1961. PARKING PLACES (CROYDON) (NO. 1) ORDER, 1961 (S.I. No. 1172) (1s. 6d.).

For penalties for contraventions see section 22 of the Road Traffic Act, 1956.

Certain restrictions with regard to waiting, loading and unloading and on the use of vehicles for the purposes of advertisement in certain streets, which were imposed under the principal Regulations (S.I. 1958, No. 1093), as amended, and by the London (Waiting and Loading) (Temporary Restriction) (Amendment) (No. 3) Regulations, 1961 (S.I. Nos. 435, 780), now no longer apply in certain streets within the London Traffic Area. In the streets where these restrictions no longer apply other restrictions on vehicles as to waiting, loading and unloading now have effect by virtue of the London Parking Zones (Waiting and Loading) (Restrictions) (Amendment) (No. 4) Regulations, 1961 (S.I. No. 1337), the Parking Places (City of London) (No. 1) and (Shoreditch) (No. 1) Orders, 1961 (S.I. Nos. 765 and 766). Both operative July 24, 1961. LONDON (WAITING AND LOADING) (RESTRICTION) AND (TEMPORARY RESTRICTION) (AMENDMENT) (NO. 3) REGULATIONS, 1961 (S.I. No. 1338) (6d.) and S.I. No. 1339 (3d.).

The principal Regulations (S.I. 1960, No. 594), as amended, are further amended so as to make them complementary to S.I. 1961, Nos. 765 and 766 (which designate parking places on certain highways in the City of London and Shoreditch), so that the restrictions imposed by the principal Regulations on the sale of goods from vehicles and on vehicles with regard to waiting, loading and unloading in those parts of streets not designated as parking places are extended similarly to areas in the City of London and Shoreditch not designated as parking places in the above-mentioned Orders. Operative July 24, 1961. LONDON PARKING ZONES (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) (NO. 4) REGULATIONS, 1961 (S.I. No. 1337) (1s. 6d.).

The principal Regulations (S.I. 1960, No. 594) as amended, are further amended by (1) extending them to apply to Curzon Place in the City of Westminster, and (2) resiting certain cycle parking areas and providing additional ones in the places specified in the Schedules to the Order. Operative June 26, 1961. LONDON PARKING ZONES (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) (NO. 3) REGULATIONS, 1961 (S.I. No. 1104) (3d.).

Magistrates' Courts

The following Order has been made in respect of petty sessional divisions: S.I. No. 1114 (Westmorland) (3d.).

Opticians

Rules have been made regulating the functions of the Legal Assessor appointed under section 16 of the Opticians Act, 1958, to advise the Disciplinary Committee of the General Optical Council on questions of law arising in disciplinary cases before them. Operative July 17, 1961. GENERAL OPTICAL COUNCIL DISCIPLINARY COMMITTEE (LEGAL ASSESSOR) RULES, 1961 (S.I. No. 1239) (3d.).

Police

This Order, made under section 1 of the Special Constables Act, 1914 (as amended by the Special Constables Act, 1923) amends previous Orders (S.I. 1955 No. 701, 1950 No. 673, and 1949 No. 589) by making similar provisions in relation to awards to widows and children of special constables as the larger discretionary awards provided for by the Police Pensions (Amendment) Regulations, 1961 (S.I. No. 625) in relation to awards to widows and children of members of police forces. Regulation 2 of the Order provides for an increase in the notional average pensionable pay of a special constable ceasing to hold that office on or after September 1, 1960, where an award calculated on that pay first becomes payable on or after July 1, 1961. Operative July 1, 1961. SPECIAL CONSTABLES (PENSIONS) ORDER, 1961 (S.I. No. 1200) (4d.).

The Police Regulations, 1952 (S.I. 1952, No. 1704) and the Police (Scotland) Regulations, 1956 (S.I. 1956, No. 1999) are amended by permitting the payment of a removal allowance where a member of a police force moves his home on transfer from one force to another (Regulation 1); and by varying the arrangements for the payment of a temporary duty allowance (Regulation 2). Both operative July 14, 1961. POLICE (NO. 2) REGULATIONS, 1961, and POLICE (SCOTLAND) AMENDMENT (NO. 2) REGULATIONS, 1961 (S.I. Nos. 1283 and 1311) (each 3d.).

POLICE PENSIONS ACT, 1961 (9 & 10 Eliz. 2, c. 35). The Act enables regulations made under section 1 of the Police Pensions Act, 1948 (11 & 12 Geo. 6, c. 24), to be consolidated with or without changes authorised by that Act (s. 1 (1)); section 1 (2) safeguards the position of special constables in relation to awards made under the Special Constables Act, 1914 (4 & 5 Geo. 5, c. 61), or the Police (Scotland) Act, 1956 (4 & 5 Eliz. 2, c. 26), s. 11, so that they shall not be adversely affected by consolidation of the regulations. Section 1 (3) extends the provisions of section 2 (2) of the 1948 Act, which preserves the validity of regulations which fail to secure the results specified in subsection (1) of that section and requires their amendment, to include a reference to section 1 (1) (2) of this Act and to regulations made in relation to special constables under the 1914 or 1956 Acts. The Act extends to Scotland, but not Northern Ireland; and became operative on June 22, 1961, the date on which it received the Royal Assent.

Poultry

The principal Regulations (S.I. 1957 No. 787) are amended in such a way that the consignment of day-old chicks of poultry to, or to the order of, any person at a railway station is no longer prohibited. Operative August 21, 1961. LIVE POULTRY (RESTRICTIONS) AMENDMENT ORDER, 1961 (S.I. No. 1405) (2d.).

Quarter Sessions

LANCASHIRE QUARTER SESSIONS ACT, 1961 (9 & 10 Eliz. 2, c. xiv), makes new provision as to the chairmen and deputy chairmen of courts of quarter sessions for the county palatine of Lancaster, and for the matters related thereto including the qualifications and salaries of persons appointed as chairman and deputy chairmen. The Act takes effect with the Lancashire Quarter Sessions Act, 1928, and parts of the Cheshire and Lancashire County Councils (Runcorn–Widnes Bridge, etc.) Act, 1947, subject to certain provisions in those Acts which are amended by this Act.

Road Traffic

For the purposes of the grant of a provisional driving licence (but for no other purposes) the definition of motor-cycle contained in section 253 (4) of the Road Traffic Act, 1960, is varied. The variation affects motor-cycles having three wheels (for example, motor bicycles with a side-car attached and vehicles commonly called " bubble cars ") by varying the maximum weight which vehicles of that class must not exceed if they are to be classed as motor-cycles. Operative July 1, 1960. MOTOR VEHICLES (VARIATION OF WEIGHT) REGULATIONS, 1961 (S.I. No. 1215) (2d.).

The Regulations of 1955 (S.I. 1955, No. 1059) are revoked and re-enacted with amendments in separate Orders for England and Wales and for Scotland. The Orders prescribe the procedure to be followed in connection with the submission and confirmation of Orders made under section 49 of the Road Traffic Act, 1960, prohibiting or restricting traffic on roads to be used as playgrounds. The main differences from the earlier Regulations are that notices in connection with the submission and confirmation of Orders are required to be published only once in a local newspaper (instead of twice), but are additionally required to be published in the London Gazette or, in Scotland, in the Edinburgh Gazette. Both operative August 1, 1961. STREET PLAYGROUNDS ORDERS (PROCEDURE) (ENGLAND AND WALES) AND (SCOTLAND) REGULATIONS, 1961 (S.I. Nos. 1242 (3d.), and 1322 (4d.)).

The Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955, No. 482), as amended, are further amended in that (1) the maximum permitted length of a public service vehicle is increased from 30 to 36 feet and the maximum permitted width from 8 feet to 8 feet 2½ inches (Reg. 2 (1) (2) and (3)); (2) new provision is made requiring that where a motor-vehicle propelled by a compression ignition engine is fitted with a device for starting the engine by supplying it with excess fuel, the device, and any apparatus for operating it, shall be so fitted that the device cannot readily be used by any person on the vehicle: this requirement applies on and after July 1, 1962, to vehicles registered before January 1, 1962, and to all other vehicles on and after January 1, 1962 (Reg. 2 (4)); and (3) provision is made requiring that such a device as aforesaid shall be so maintained that it does not operate, and a prohibition is imposed on the use of such a device, while the vehicle to which it is fitted is in motion on the road (Reg. 2 (5)). Operative August 1, 1961. MOTOR VEHICLES (CONSTRUCTION AND USE) (AMENDMENT) REGULATIONS, 1961 (S.I. No. 1313) (3d.).

For penalties for contraventions see Rule 104 and sections 111 and 113 of the Road Traffic Act, 1930.

Section 85 (1) of the Road Traffic Act, 1960, which enables the Minister of Transport, by order on the application of the local authorities concerned, to designate parking places on highways in their areas for vehicles and enables those authorities to make charges for vehicles left in such parking places, is now applied to the areas of all those county boroughs and county districts in England and Wales to which it has not previously applied. Operative July 17, 1961. PARKING PLACES (EXTENSION OUTSIDE LONDON NO. 3) ORDER, 1961 (S.I. No. 1324) (2d.).

The principal Regulations prescribe for the purposes of section 221 of the Road Traffic Act, 1960, three types of helmets which may be sold or hired to motor-cyclists as helmets which are recommended as affording protection in the event of accident, without an offence being committed under that section. These Regulations alter the requirements with which one of those types of helmet must comply. Operative August 1, 1961. MOTOR CYCLES (PROTECTIVE HELMETS) (AMENDMENT) REGULATIONS, 1961 (S.I. No. 1348) (2d.).

For penalties for contraventions see section 239 of the Road Traffic Act, 1960.

The First Schedule to the Road Traffic Act, 1960, prescribes speed limits, subject to conditions, for specified classes or descriptions of vehicles; these provisions are now varied so as to increase the speed limit of passenger vehicles having an unladen weight exceeding 3 tons or adapted to carry more than seven passengers (excluding the driver) from 30 to 40 m.p.h. Operative July 26, 1961. MOTOR VEHICLES (VARIATION OF SPEED LIMIT) REGULATIONS, 1961 (S.I. No. 1377) (2d.).

The Various Trunk Roads (Prohibition of Waiting) (Special) Order, 1960 (S.I. 1960, No. 963), which prohibited waiting on a few lengths of trunk roads, is revoked and replaced by a new Order which prohibits the waiting of vehicles on certain very much more extensive lengths of main carriageways forming part of trunk roads outside the London Traffic Area, subject to the exceptions specified in Article 2. Operative August 1, 1961. VARIOUS TRUNK ROADS (PROHIBITION OF WAITING) (CLEARWAYS) ORDER, 1961 (S.I. No. 1422) (6d.).

For penalties for contraventions see section 239 of the Road Traffic Act, 1960.

The Removal of Vehicles (England and Wales) Regulations, 1957 (S.I. 1957, No. 675) are re-enacted with amendments. The main changes are (1) the powers of a constable to move a vehicle on a road or to remove it from a road on the ground of obstruction are no longer made subject to the restrictions (concerning the position of the vehicle) contained in the earlier Regulations (Reg. 5); (2) certain local authorities are empowered to remove from roads in their areas broken down or apparently abandoned vehicles (Reg. 6); and (3) the police and local authorities are given powers to sell or dispose of apparently abandoned vehicles which they have removed. This power of sale can only be exercised after certain steps have been taken to enable the vehicle to be claimed and after a period of at least six weeks has elapsed (Part III of the Regulations). Operative September 1, 1961. REMOVAL OF VEHICLES (ENGLAND AND WALES) REGULATIONS, 1961 (S.I. No. 1462) (4d.).

Scotland

The Probation (Scotland) Rules, 1951 (S.I. 1951, No. 1261), as amended, are further amended by increasing the preliminary period of appointment of probation officers from twelve to eighteen months, by providing that the period during which the scales of annual salary in the Fifth Schedule to the Rules shall be payable shall be the period immediately following appointment in which a probation officer is undergoing full-time training, and by increasing the scales of annual salary in the Fifth Schedule. Operative July 4,

1961. PROBATION (SCOTLAND) AMENDMENT RULES, 1961 (S.I. No. 1269) (3d.). See also the Police Pensions Act, 1961, under Police, *supra*.

Regulations, made under the provisions of the Police Pensions Acts, 1948 and 1961, amend the Police Pensions (Scotland) Regulations, 1955, by altering the entitlement of policemen to pensions, and by making certain further amendments consequential upon the alteration. Operative August 7, 1961. POLICE PENSIONS (SCOTLAND) (AMENDMENT) (NO. 2) REGULATIONS, 1961 (S.I. No. 1444) (3d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

85. *Duty of prosecutor—whether copy of charge(s) and statements made by accused to the police should be given to defence*

1. Is it considered in England the duty of the prosecution to give to the defence a written copy of the charge and statements made by the accused to the police.

2. A is charged with receiving stolen property which was found on his premises. Information as to the whereabouts of the property was given to the police by C who made a statement to the police indicating that A received the property. Later C made a further statement to the police in which he agreed that he was paid to "frame" A by a rival trader. The police did not inform counsel for the defence of the existence of these statements. C has disappeared and cannot be called as a witness for the defence. The prosecution made no attempt early in the investigation to make C available to the defence. On cross-examination the police officer gave the name of C as the informer but refused to produce the second contradictory statement. Is this a breach of professional conduct? The magistrate refused to allow defence counsel to cross-examine the police officer on the fact that C had admitted the whole matter was a "frame up." Is there any way in which this evidence can be brought to the attention of the court in the absence of C? [R. W. C.]

ANSWER

1. By virtue of a Home Office direction to all police forces a copy of any charge made must be supplied to the accused person.

There is no duty on the prosecution to supply to the defence a copy of any statement made by the accused.

2. In *R.* v. *Bryant* (1946) 110 J.P. 267, it was laid down when the prosecution decide not to call a potential witness they should inform the defence and supply the witness's name and address, but they are under no obligation to give a copy of any statement made by a potential witness. As was pointed out by the Court of Criminal Appeal, any such statement would not be evidence in the proceedings.

In *R.* v. *Thomson* [1912] 3 K.B. 19, it was held, in an abortion case, that it was not admissible for the defendant to try to adduce by cross-examination of a witness that the woman in question (who was dead at the time of the trial) had stated her intention of performing an operation on herself to procure a miscarriage. In *R.* v. *Willis* [1960] 1 All E.R. 331, the general principles governing "hearsay" were considered and it was pointed out that a statement made by a person not called as a witness might be admissible as evidence if the purpose of adducing it was to establish, not its truth, but the fact that it was made. In the present case, the purpose of the defence was presumably to establish the truth of C.'s alleged statement and therefore the magistrate was justified in refusing to allow the cross-examination to proceed on that point. There was no question, as there was in *R.* v. *Willis* (above) of showing the effect of the statement on the accused's mind. [A. E. J.]

Letters to the Editor

The Criminal and His Car

Sir,

In approving the draft of the Firearms Act of 1957 the legislators realised the potential danger of firearms in the hands of criminals and passed sections of that Act which were calculated to effect some control. Sections 21 to 25 provide, among other things, increased penalties for carrying firearms in the course of committing crime and a prohibition from possessing a firearm after having been sentenced to three months' imprisonment or more. Whether it is due to this Act or to the apparent dislike of firearms by British criminals that there are so few cases of crime where weapons are used, must be a matter of conjecture. The Act exists, however, and could be most effective if there were a sudden upsurge of this type of crime.

Higher wages and hire-purchase have combined to put an instrument of greater value into the hands of the criminal, a weapon of more potentiality than any revolver or automatic pistol—the motor-vehicle. In a tremendous number of serious crimes there is a car, van or lorry involved, and with the exception of wages snatches and similar violent crimes where stolen cars are used most criminals are lawfully in possession of the vehicle. Even the moderately successful modern thief can raise the deposit on a fast and efficient car, with which he can range far and wide, committing crimes which a few years ago would have been impossible to him for reasons of distance and bulk of property.

Before the last war the "travelling" criminal was rare. When he did strike he was a bane on police forces all over the country due to the difficulty of detection. He would visit a county police district, commit a crime or series of crimes, and be gone away before the ponderous machinery of the police could be set in motion. The modern criminal is now a traveller by rule rather than exception. From cities, towns and even villages, singly or in groups, they radiate outwards, each intent on committing his crimes as far from home as possible; slipping home after first leaving the proceeds at another point perhaps as far away in the opposite direction. Only their unrestricted use of vehicles makes it possible to commit these crimes and allows them much less chance of detection.

To counter the increased mobility of the criminal the police have improved communications and have achieved a corresponding increase in mobility. The battle however, remains one-sided, since new trends in crime cannot always be anticipated and it is so often necessary to provide an antidote to a new type of crime after it has been successfully committed a number of times. In addition, the modern thief is cleverer and better educated than his forerunner. He will sometimes be provided with short-wave radio to monitor police radio messages which might affect his escape. He is alive to the scientific methods of detection and will take steps to remove incriminating evidence from his car and clothing, before his crime has even been discovered. He will have a carefully planned cover story to explain his presence many miles from home, if stopped by police.

Whilst the firearm is a weapon of offence, made and carried for violent action, the motor-car is an instrument of transport only. It is still possible to draw a parallel between them, however, since in the hands of a criminal, each is an instrument for the commission of crime. There is also the point that, of recent years, an increasing number of people, both police and civilians, have been killed or injured by the cars of escaping criminals.

Unless a thief is convicted of a road traffic offence in connection with his crime there is no way at present of restricting his use of motor-vehicles. He cannot be disqualified from driving without conviction under an appropriate section of the Road Traffic Act, and if he does become disqualified for any reason it is not with the intention of restricting his potentiality as a thief but merely as a punishment for a traffic law infringement. It is becoming increasingly obvious that a new conception of thought must be applied to this problem, unless it is to be allowed to grow out of hand. We must return to the precept that it is better to prevent than to cure, and what better prevention could there be in this matter than the restriction of the confirmed thief's use of vehicles. To many criminals the removal of his right to drive would be the removal of his effectiveness in crime.

By the simple measure of granting the courts some controls broadly similar to those provided in the Firearms Act, over the motorised thief, much of the country's crime problem could be wiped out. If the courts, quite properly, have the power to remove the privilege of transport from certain traffic offenders, how much more desirable it is that they should have the power to remove the right from those who carry away millions of pounds worth of stolen property every year.

Yours faithfully,
STUART ANDREWS

Watford, Herts.

Books and Periodicals

Book reviews:

Probation—The Second Chance. By John St. John. Foreword by Frank Dawtry, M.B.E. 1961. Vista Books, London. 280 pp. 25s. net.

Apart from contributions to the more specialised literature, probation officers do not seem to write about their very difficult and interesting work. The result of this is that the general public know little of what they do, apart from references to the probation service in the Press and a somewhat dramatised version of the service's activities on television. It is therefore very pleasant to welcome Mr. John St. John's account of the work of the probation service. Mr. St. John writes as a layman; he is a journalist by profession and is on the staff of a London publishing house. However, he seems to be a well-informed layman with something of a gift for describing the complexities of human relationships and difficulties in a clear and very readable fashion. In order to write this book, Mr. St. John obtained the help and encouragement of the Probation Division of the Home Office who placed a number of facilities at his disposal, and, having satisfied themselves as to the author's intentions, gave his enterprise their blessing. Although actual cases are referred to, every attempt was made to preserve confidentiality, and clients' identities have been appropriately disguised. Mr. St. John's book gives an account of adult probation, and does not set out to describe specifically juvenile court work, matrimonial case-work or after-care in detail. In general he succeeds in his purpose of attempting to describe the theory and practice of probation in an objective yet non-technical fashion. There are numerous references to the specialised literature and it is obvious that the author has taken the trouble to acquaint himself with the more serious works on the subject. With some skill he describes the essentials of the case-work relationship and the various forces that bring about delinquent conduct. All kinds of offenders and their offences are described and the author tries to group certain offences in order to show how different symptoms operate. Here and there the author's attempts to quote from technical sources break down and he refers to various lectures or papers without giving their sources (as, for example, at pp. 33, 36 and 105). In two places Mr. St. John appears to get his facts a little confused. For example, on p. 53 he seems to infer that it is a legal requirement for the probationer to *sign* the copy of a probation order, and on p. 61 he refers to "convicts" when discussing the classification of prisoners. Occasionally the more intimate details of clients' lives are described in a slightly crude style which detracts from the author's attempt at objective reporting and comment. The book is well set out and is very easy to read. There is a short but fairly comprehensive bibliography; it was somewhat marred for this reviewer by finding Sewell Stokes's rather slight account of his experiences as a probation officer sandwiched between Radzinowicz and the United Nations.

In spite of these criticisms the author has attempted to give a sincere and accurate account of the work of the probation service. It should prove useful to the general public and as an introductory source of reference for magistrates and lawyers, provided that they can turn to the more specialised accounts for further information. If these limitations are borne in mind Mr. St. John's book deserves to be read widely.

HERSCHEL A. PRINS

Books received:

Crime and Juvenile Delinquency. A Rational Approach to Penal Problems. 2nd ed. By Sol Rubin. 1961. London: Stevens & Sons, Ltd. New York: Oceana Publications Inc. xix and 248 pp. (including index). 35s. net. [No. 5 in the Library of Criminology.]

Road Transport Law. A Summary of the Legislation Affecting the Construction, Equipment and Use of Motor Vehicles. 13th ed. By L. D. Kitchin, A.M.INST.T. Revised by E. K. Wenlock. 1961. London: Iliffe Books, Ltd. vi and 142 pp. (including index). 15s. net.

Censors. The Rede Lecture, 1961. By Lord Radcliffe. 1961. Cambridge University Press. 32 pp. 3s. 6d. net.

Malaya and Singapore, The Borneo Territories. By L. A. Sheridan with specialist contributors. 1961. London: Stevens & Sons, Ltd. xxiv and 510 pp. (including index and maps). £4 4s. net. [Vol. 9 in *The British Commonwealth, The Development of its Laws and Constitutions.*]

The Murderer and His Victim. By John Macdonald. 1961. Illinois: Charles C. Thomas. Distributed in the U.K. by Blackwell Scientific Publications, Ltd., Oxford. xiv and 420 pp. (including index). £4 4s. net.

Readers' digest:

Betting and Gaming: The bingo bungle. 105 *Solicitors' Journal* 597.

Conspiracy: Conspiracy to corrupt public morals: 111 *Law Journal* 447.

Costs in Criminal Cases: Counting the cost: 125 *Justice of the Peace* 440.

Forgery: A new type of fraud: airline ticket forgery: 16 *International Criminal Police Review* 150.

Larceny: *Historical*: Predatory Crime: 125 *Justice of the Peace* 409 and 455.

Navigation Laws: *Waterways*: Policing the Waterways: Spring 3100. Vol. 32. No. 7. P. 20. (published by the Police Department, City of New York).

Offensive Weapons: The Restriction of Offensive Weapons Act, 1961: 105 *Solicitors' Journal* 657.

Official Secrets Act: Treason: Sentence: Criminal law topics: 232 *Law Times* 62.

Police: A Chief Constable on police estimates: 125 *Justice of the Peace* 457.

Police: *Entry of private premises*: "May I come in please?": 69 *Police Review* 576.

Road Traffic: Defence to careless driving: 111 *Law Journal* 463.

Road Traffic: Drink and dangerous driving (based on *R.* v. *McBride*, above, p. 625): 125 *Justice of the Peace* 468.

Road Traffic: Notice of intended prosecution: further reflections on *Sanders* v. *Scott*: 231 *Law Times* 59.

Road Traffic: Standardised fines for road traffic offences: 125 *Justice of the Peace* 425.

Sentence: *Probation*: A right or a privilege?: 125 *Justice of the Peace* 469.

Sentence: *Probation*: Condition of residence: 111 *Law Journal* 471.

Town and Country Planning: *Enforcement Notices*: The hydra: 111 *Law Journal* 497.

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1961

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the Editor, *Criminal Law Review, 11 New Fetter Lane, E.C.4. Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW REVIEW

October 1961

Magistrates—1361–1961

This special issue commemorates a notable anniversary. Six hundred years ago the statute 34 Edw. 3, c. 1, conferred upon " one lord and with him three or four more of the most worthy in the county with some learned in the law " definitive functions for the keeping of the peace of their county. From this statute in particular the magistracy derive their familiar title, now commonly abbreviated to two letters in conformity with modern practice. The continuity of the office and function of the justice of the peace from that time to this exemplifies the stability of our national institutions over a remarkably long period. It is not just an historical curiosity, it is matter for wonder and fertile ground for thoughts of all kinds that our modern benches still " take . . . surety . . . of . . . good behaviour " by the authority of a statute of 1361.

An anniversary of this kind is not an occasion merely for adulation and empty piety. Nor, we are glad to see, have our contributors interpreted their several commissions in that spirit. Every continuous or repetitive activity requires a periodic stocktaking, for which an anniversary provides a convenient, if arbitrary, opportunity. The most obviously relevant questions to be asked on this particular anniversary are those concerning the historical accidents of our magisterial system. One striking example is discussed by " A Stipendiary Magistrate "—namely, the dual system of lay and stipendiary and the features of its geographical divisions. The learned author describes as inviolable the frontier between metropolitan stipendiaries and lay justices in areas around the county of London. His language is touched with irony, as well it may be. No part of a legal system should be regarded as immutable. Nothing is sacred until it is the best that one can do.

One of the besetting vices of our society is the tendency to assume that things are all right as they are—because they are as they are and they are what we know. When Royal Commissions tell us that things could be better than they are and tell us why, we ignore both evidence and conclusions and are content that we had the dignity to inquire into the matter by so rational and respectable a process. So perhaps the urgings of our contributors are bound to be of academic interest only. Perhaps the fact that one of our contributors is unhappy about the system of appointing lay justices is just one more fact to be quoted in other periodicals. Perhaps we are content that our lay benches should be staffed to some considerable extent by people " who should not be there at all," as " A Chairman of Quarter Sessions " observes and as every practitioner will tell you is true. Perhaps it is a matter for pride that, as Lady Wootton implies, in our method of approach to " the problem child or the child with a problem " we are half a century behind (and when nowadays are we not behind?) our Scandinavian neighbours.

None of these observations is in the least intended to colour our expression of admiration for the sacrifice by all justices of their time and energy and for the enthusiasm and assiduity with which most of them discharge their offices. Poetry, as Sidney taught nearly four centuries ago, is not to be condemned because there are bad poets. An institution is entitled to commendation although it could be improved. The institution we commemorate this month deserves the thanks and commendation of us all.

Magistrates' courts and mentally disordered offenders

The Home Office has issued for the guidance of magistrates' courts a circular[1] concerning mentally disordered persons who commit offences not punishable with imprisonment and in respect of whom, therefore, a hospital order under the Mental Health Act, 1959, s. 60, cannot be made.

The circular refers to a number of types of situation involving mentally disordered offenders and to available procedures:

(a) Offender found by the police in a public place and needing care and control: removal by police to place of safety: s. 136.

(b) Offender found to need urgent treatment after charge but before appearance in court: emergency application for admission to hospital, made by mental welfare officer on recommendation of medical practitioner: s. 29.

(c) Disorder detected on appearance in court: court may remand for medical report. This should be expressly for consideration of admission to hospital under Part IV of the Act.

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[1] No. 151/1961.

(d) Situation (c)—bail granted, offender agreeing to attend hospital for examination: admission to hospital for compulsory detention and treatment can then be arranged if it proves necessary on examination.

(e) Situation (c)—remand in custody: if prison medical officer considers compulsory detention necessary, the mental welfare officer for the court's area will be told and will attend court, ensuring the offender's early admission to hospital.

Current research projects

In a written answer [2] Mr. Butler surveyed the work at present being done by universities and other agencies in the field of delinquency, the treatment of offenders and related subjects. Arrangements have been made with the London School of Economics for a long-term study consisting mainly of the investigation of, and experimentation with, various methods of research. This will be the largest single research project hitherto sponsored by the Home Office.

Research is proceeding on several subjects at the Cambridge Institute of Criminology, including crimes of violence in London, the state of crime in England and Wales, the social consequences of conviction, and the development of delinquent tendencies in children. At Oxford research is being done on detention centres and on delinquency among girls. University College London is engaged on a comparative study of the effect on young offenders of borstal training, detention in a detention centre, and imprisonment. Research is also in progress at the London School of Economics, Birkbeck College, London, the Institute of Psychiatry and the Universities of Glasgow, Edinburgh and Nottingham.

The Home Secretary then summarised the work being done by the Home Office Research Unit in fulfilling the tasks it has so far set itself. These are (1) studying research on delinquency and the treatment of offenders and acting as adviser to the Home Office on this and allied subjects; (2) making special investigations as required by the Home Office or by Departmental and other Committees and advisory bodies; (3) carrying out a comprehensive programme of research on the treatment of offenders. As part of (3), arrangements were in hand for a study to be undertaken mainly within the Probation Service. This will involve the investigation of both existing and experimental ways of handling probation case-loads, and the consideration of possible new methods; and the examination of the different ways in which probation officers carry out supervision and the effects of these methods on the various types of offender—it is hoped that this will lead to methods of matching offenders with methods of treatment so as to produce the best result. Mr. Butler intimated that reports on two more of the research studies mentioned in the White Paper are awaiting publication.

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[2] H.C.Deb. Vol. 644, cols. 100–102.

The Home Secretary concluded by stressing the immense amount of work to be done, and the length of time that may elapse before information based on research studies could be of material assistance to the courts in sentencing; but in the meantime the results of research were of value within the penal system where there was considerable scope for the application of findings to the classification and treatment of offenders.

P.E.P. (Political and Economic Planning) are beginning a three-year study of the needs and problems of prisoners' families. This study the first P.E.P. project in the field of crime and delinquency, will review the factors affecting prisoners' families and will consider present methods of meeting their needs. Because of the increasing number of people in prison for debt, hire-purchase commitments will receive special attention.

Judicial appointments

Mr. Matthew Anthony Leonard Cripps, D.S.O., T.D., Q.C., has been appointed Recorder of Nottingham.

Mr. John Charles Llewellyn has been appointed Recorder of King's Lynn.

Mr. Norman John Lee Brodrick, Q.C., has been appointed Deputy Chairman of Middlesex Quarter Sessions.

Mr. Wyndham Matabele Davies, Q.C., and Mr. David Powys Rowland have been appointed Chairman and Deputy Chairman respectively of Glamorgan County Quarter Sessions.

Mr. John Patrick Graham, Q.C., has been appointed Deputy Chairman of Salop Quarter Sessions.

Mr. John Robert Thomas Hooper has been appointed Deputy Chairman of Buckinghamshire Quarter Sessions.

His Honour Judge Gerard Gustav Lind Smith has been appointed Chairman, and Mr. Robert Daniel George David and Mr. Philip Loscombe Wintringham Owen have been appointed Deputy Chairmen, of Chester County Quarter Sessions.

Mr. George Frederick Irvon Sunderland has been appointed Deputy Chairman of Warwick County Quarter Sessions.

Mr. Thomas Ker Edie has been appointed a Metropolitan Stipendiary Magistrate.

The Lay Justices: Some Criticisms and Suggestions

By A Chairman of Quarter Sessions

Desirability of continuing lay magistracy

The Royal Commission on Justices of the Peace which reported in 1948 was not specifically asked to consider the desirability of maintaining or abolishing the lay magistracy. But it did consider it, and, with one dissentient, came down on the side of maintaining it. " In our opinion the system calls for improvement, not for radical change " (para. 216). The sole dissentient on this point was Lord Merthyr who considered that it was merely a question of time before the lay justices disappeared. " It is not a question of whether, but of when, they should be replaced by professionals." He contemplated, as a reasonable period within which the change could be carried out, some five or ten years.

Only to this limited extent was the continuance of the lay magistracy an issue in 1946–48 and even then Lord Merthyr's arguments, however cogent, had virtually no chance of acceptance. They have less today. A vast " vested interest " (using that hackneyed term in a purely neutral sense) has been built up. It consists of the justices themselves (organised to a considerable extent in the Magistrates' Association), of their friends and relatives, of the numerous people who seek appointment to the Bench, of the numerous bodies who seek to secure their appointment and of the local authorities whose chairmen (contrary to the recommendation of the Royal Commission) have continued to enjoy magisterial status *ex officio* during their term of office. If there were any doubt about the continuance of the lay magistracy a reading of the report of the Interdepartmental Committee on the Business of the Criminal Courts (the " Streatfeild Report," Cmnd. 1289/1961) would allay it. The Committee recommended a considerable extension of summary jurisdiction and its arguments against the further development, at present, of the system of Crown Courts would presumably apply to stipendiary magistrates' courts since, they too, represent a form of " personalised " justice.

Such is one trend of events since 1948. But it is not the only one to be taken into account. We have seen in almost every other sphere an increasing demand for the " qualified " person, the man or woman who possesses a degree or a diploma or a certificate. Newly-qualified doctors have to spend a year in hospital before they can go into private practice. Teachers' training colleges in

England are giving three-year courses instead of two. It is proposed that entry into solicitors' articles should be restricted to those who possess the G.C.E. qualifications necessary for admission to a university. The same thing applies to those occupations which are, as it were, auxiliary to the administration of justice. Justices' clerks, with comparatively few exceptions, are now whole-time professionals; a higher standard of education and training is being demanded of policemen, probation officers and social workers. By contrast, the lay justice, appointed without any sort of educational or technical or temperamental test and not subsequently required to pass one, stands out as a glorious anachronism.

Difficult questions of law

The situation is aggravated by certain other factors. Although petty sessional benches are supposed nowadays to possess clerks better trained in the work than their predecessors (an assumption which I should not accept without reservations) a number of decisions have made them understandably cautious about consulting their clerks. And, with or without the help of their clerks, lay justices are from time to time obliged to give decisions (often on points of evidence or procedure) in comparison with which the task of a recorder trying, let us say, a case of indecent assault, is remarkably easy. If a man is charged with dangerous driving but not with "driving under the influence," how far is the Bench justified in admitting evidence of his having taken drink? Suppose that the holder of a provisional licence is charged with driving a motor-cycle combination when not accompanied by a qualified person and it appears that, although the sidecar was originally constructed to hold a passenger, it had been altered before the date of the alleged offence to carry tools and could only hold a passenger with difficulty: is the driver guilty? These examples are only chosen at random: much more difficult questions could have been found. But one wonders if there is any other country in the world where lay justices are required to decide points of such difficulty; and if our legislators and parliamentary draftsmen sufficiently consider that their Bills will have to be interpreted by lay justices. When one adds the assumption that justices should be recruited from a wide range of social classes one comes to the position where a question which the Divisional Court or the Court of Criminal Appeal, assisted by experienced Counsel, would have difficulty in answering has to be answered by the retired farmer, the checkweighman and the school-caretaker. There is the further cause for anxiety in the very heavy demands which attendance at court makes upon the time of the members and especially the chairman of a busy division. Even in comparatively law-abiding districts the work of petty sessional benches has probably been doubled or trebled in the last ten years and a further increase seems inevitable. The busy man, who is usually the able and successful man, can find these demands an intolerable burden. The effective choice is often between working two or three good justices almost full-time and diluting the bench (and, of course, the quality of the decisions) by enlisting the attendance of a number of "bodies" whose duty is to sit there and look as wise as they can.

Unsuitability of some cases for decision by lay justices

This is only one facet of a fundamental dilemma. The lay magistracy is not only hallowed by tradition but represents a vast and probably irremovable interest. On the other hand, the amount of work it has to do and the extreme complexity of some of it impose personal and intellectual burdens on lay justices which, it is arguable, are heavier than they ought to bear; either in their own interest or in that of the public.

The answer is not so to increase the number of justices that each has less to do but to see if certain classes of cases should not be removed from the jurisdiction of the lay magistracy. These would be cases which were judged to be too difficult, emotionally or technically, for petty sessional benches. Most benches, in my submission, are unsatisfactory tribunals for matrimonial cases. For one thing, such concepts as desertion and cruelty can—quite understandably—cause acute difficulty. For another, differences of sex, class and age are apt to play too great a part. A predominantly working-class bench in an industrial area is likely to demand much stronger evidence of cruelty than a predominantly middle-class bench. A bench with a majority of women justices is capable of coming to a different conclusion, on the same evidence, from that of a bench with a majority of male justices. Again, the concept of marriage and of matrimonial duties is apt to differ considerably in the view of different generations. There is another class of case which, though it does not arouse disturbing emotions, may well be too complicated for lay justices. Without attempting to give a complete or unchallengable list one may point to cases under the Planning Acts, the Gaming and Betting Acts and the Food and Drugs Acts. From time to time it has been suggested that there should be special, professional courts for motoring cases. That, in view of the intricate relation between motoring offences and crime as a whole, though it would save a great deal of magisterial time, would be altogether too radical a departure. But there may be a strong argument for removing certain broad classes of cases, of the kind I have suggested, from the jurisdiction of the lay magistracy. That, of course, raises the question, to what tribunal they should be assigned. The comparative reluctance to exercise the powers to appoint a stipendiary magistrate does not indicate any great enthusiasm for members of that hard-worked brotherhood. It might be that the county court judges, adequately strengthened in number, sitting perhaps at more centres than they now do and equipped with the necessary jurisdiction, would provide the alternative tribunal.

Quality of appointees

Even so, there would remain a great amount of work and some of it very difficult work, for the lay justices to do. Are we securing the appointment of enough lay justices of sufficiently high quality? I am afraid that we are not. That we are getting some of high quality is, happily, obvious. But the effect is no more than to staff the petty sessional benches with justices of whom a third are competent, a third passable and a third who ought not to be there at all; a combination of the first and second classes affords a reasonably good tribunal; a combination of the second and third a highly dubious one. It may be said, of course, that experience, reading, attendance at instructional courses and lectures will turn a poor magistrate into a good one. I am afraid that I cannot concur in that fashionable opinion: I doubt if the average man or woman of, say, forty-five is inclined to serious reading on a new subject or is likely to be receptive to instruction; in many areas, moreover, attendance at lectures would not be easy. No doubt the lay justice who is initially suitable for appointment can and often does seek to make himself or herself still better qualified. But, by and large, I think we shall have to take most lay justices as we find them.

If that is so, the problem is that of finding the best. I know too little about the appointment of borough justices to be able to say anything useful on that point. In respect of the appointment of county justices it appears to me that while the present system of balancing occupations, social classes and political affiliations reduces the risk of a particular bench being composed of members of the same class or the same politics, this is only a limited and negative benefit. The advisory committee, having recommended a candidate sponsored by the Women's Co-operative Guild, then proceeds to achieve a balance by recommending a Conservative farmer sponsored by the N.F.U.; in all probability each is a member of a local authority—a qualification which, too often, is regarded as a *sine qua non*. What we lack, perhaps more and more, is the independent, uncommitted lay justice. Benches are apt to contain too high a proportion of justices who, however respectable, public-spirited and well-meaning in themselves, have been appointed not for their individual merits but to balance other appointees. Advisory committees are bound to stay but they could usefully be supplemented by the freer use of direct recommendation to the Lord Chancellor, through the Lord Lieutenant, by such persons or bodies as the county court judge, the local law society, the Chairman and Deputy-Chairmen of Sessions. And, though this would call for legislation, is it not time to reconsider the position of the *ex officio* justice? The more care is taken to select suitable men and women for the bench, the more absurd and anomalous this system of indirect popular election becomes.

Selection of the chairman

The chairmen of petty sessional benches form a body of persons who are at least as important in the county as the chairman of Sessions or the Judges of Assize. The Royal Commission recommended that " in counties the selection made by the various benches should require confirmation by quarter sessions." This recommendation has not been implemented although a chairman who is unsuitable by reason of defects of character or temperament, too intimate party or business associations or sheer lack of ability, can ruin a bench. It is true that benches, on the whole, select their chairmen wisely and are capable of getting rid of a bad chairman in the long run. But a great deal of harm can be done in the meantime and there is a strong case for requiring confirmation of such appointments. It would save a great deal of embarrassment, however, if the confirmation required were that of the Lord Chancellor, who would seek the advice of the chairman of Sessions and the clerk of the peace.

Sentencing by petty sessional benches

As tribunals deciding fairly uncomplicated questions of fact—of the sort which arise in most driving and larceny cases—there is a great deal to be said for petty sessional benches and there is no need, so far as this goes, to fear the proposed increase of their jurisdiction. They are likely, on the average, to be considerably better than a jury. The chief criticism to be made against them—and it is a formidable one—is in respect of sentencing. It is always risky to comment on sentences when one has not been in court during the hearing of a case. But, even so, the disparity in sentences appears to be excessive and occasionally scandalous, both as between bench and bench and between penalties for different offences imposed by the same bench. Every experienced solicitor knows of benches which almost invariably impose a two-years' disqualification for "driving under the influence" and of others where the minimum of one year is never exceeded and then is reduced at the earliest possible moment. A motorist who hears the perpetrator of a vicious and damaging assault fined £10 and is then himself fined £25 and has his licence endorsed for a mild piece of careless driving is not likely to believe that justice is being done.

I do not suggest that the power of sentencing should be withdrawn from petty sessional benches: to do that would deprive them of their authority and reduce their proceedings to something almost farcical. But there are two other steps which could properly be taken. One is that Parliament should not be afraid of providing for substantial minimum sentences, however little the Magistrates' Association may like them. The second is that something more should be done to provide for continuous (which does not mean carping or hostile) supervision of benches. This would be quite distinct from the occasional correction on specific points given by the Divisional Court and the Appeal Committee of Sessions. At present, justices' clerks send to the Home Office a record of convictions and sentences. My suggestion is that they should be required also to make such a return, perhaps quarterly, to the Clerk of the Peace. He would consider it and, in consultation with the chairman of Sessions, would decide if there appeared to be any strikingly unsatisfactory features. If it seemed that a particular bench was over-lenient in respect of specific types of crime, or scarcely ever used its power to commit for sentence or treated breaches of probation orders as trivialities, it would be the duty of the chairman and the Clerk to make a report to the Lord Chancellor. If the Lord Chancellor was not satisfied it would be for him to communicate with the bench in question.

The position of the lay justices is singular in this respect: individual justices and benches meet with much criticism, partly perhaps because so many people encounter them while comparatively few, outside London, encounter stipendiaries; but the lay magistracy as an institution is regarded as almost sacrosanct. But the magistracy as a whole cannot be better than the men and women who compose it. This article is meant to reflect my strong desire that it should not be regarded as above criticism or alteration and, on the other hand, that its members should not be regarded as hopelessly out of accord with contemporary, professional standards.

The Position of Stipendiaries Today

By A Stipendiary Magistrate

Origins of the stipendiary magistracy

All this year, with bacchanalian abandon, the J.P.s are celebrating that great day in 1361 when the first justices sprang fully-grown from the brain of Edward III, like Pallas Athene from the head of Zeus. The forty-four stipendiaries (twenty-nine in London, fifteen in the provinces) will never have such junketings to honour the wonder of their own birth; their origins are more lowly and more obscure. The learnèd Webbs claim to trace the pedigree of the London beaks back to the court justice of the sixteenth century; this shadowy figure, part spy and part sycophant, was mainly concerned with the unobtrusive arrest of persons considered dangerous by the government of the day. The lugubrious Sir Edmund Berry Godfrey (the victim in one of the great classical whodunits) was a court justice; so was Colonel De Veil, when he set up his justice shop in Bow Street in 1734, and became, in fact though not in name, the first Chief Metropolitan Magistrate. Even the Fielding brothers were remunerated " under the counter " from secret service funds. It was not until 1792 that (in a move against the corruption of the old trading justices) the first stipends were openly paid; in 1839 Sir Robert Peel's plan for a full-time, fully-paid, professional magistracy for the whole of London was implemented. In the provinces the thing came about in an even more casual way. As the new industrial towns grew up, there were not enough " gentlemen " (and magistrates in those days had to be " gentlemen ") available to keep the local benches going, so stipendiaries were appointed piecemeal to supplement the hard-pressed J.P.s.

Fashions in stipendiaries have changed greatly over the years. De Veil was a jolly old soldier of fortune. Henry and John Fielding fought against the contemporary crime-wave with a sort of dedicated fury, which they managed to combine with enormous compassion, and practical sympathy for, the unfortunate. Mr. Fang in *Oliver Twist* (a light disguise for Allan Laing, who tyrannised over the Hatton Garden district until he was removed as a result of Dickens' brilliant campaign) was a monster of cruelty and boorishness. Before the great reforms of this century there were some magistrates who regarded themselves as social workers as much as judicial officers, and who organised miniature welfare states in their own districts. But perhaps more common were the elderly gentlemen who regarded their appointment as a soft job, which could properly be combined with a life of ease. Like Belloc's hero, they worked

All day long from ten till four
For half the year or even more.
With but an hour or two to spend
At luncheon with a clubland friend.

The modern stipendiary is to be found somewhere between these extremes. Few would now regard it as intolerable to sit more than the three days a week which Peel thought was enough "owing to the trying and depressing nature of the work"—or would apply for the appointment on the engaging ground given by a candidate in 1792 that "it would afford me an opportunity of giving my daughters some advantages which you know they cannot have in the country. I should have no objection to the attendance required in such an office." Fewer still would wish to emulate the example of their greatest predecessor, Henry Fielding, and sit in court all night taking depositions. The average stipendiary today has been in reasonably busy practice at the bar (or very occasionally as a solicitor); he has been appointed in early middle age, and tends to be interested in the two things with which he has most to do—the law and people.

It can be a strenuous job. The pace, with work at its present level, is sometimes punishing. Cases come before the stipendiary all day in endless succession. He is taking decisions himself all the time. Though many cases follow a predictable course and may be deadly dull, custom cannot stale the infinite variety of others. A stipendiary may have to switch his attention in the twinkling of an eye (and the closing of a court) from the problem of deciding what proportion of the cost of repairing the drains neighbouring owners should pay, to trying to reconcile Merriman P.'s views on cruelty in *Jamieson* v. *Jamieson*[1] with those of Denning L.J. in *White* v. *White*.[2] He has no colleagues to consult; he cannot (or should not) turn to his clerk, murmuring to himself:

Cast care aside, upon thy guide
Lean, and his wisdom will provide.

He cannot enjoy an "easy" while counsel is addressing a jury, though he sometimes can when depositions are being taken; there are no retirements to his room while a jury is deliberating. Men who have sat both as stipendiaries and as Recorders maintain that the former is far the more exacting job of the two.

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[1] [1952] A.C. 525.

[2] [1950] P. 39.

Justification of the dual system

No one would claim that the present dual system (the result of historical accidents) can be satisfactorily explained in theoretical or logical terms. It does not make much sense that Leeds and Pontypridd should have stipendiaries, and that Sheffield and Bristol should have none. London is odder still. It was Peel's idea that, as the capital expanded, the Metropolitan Police District and the Metropolitan Magistrates' jurisdiction should expand likewise. The first did, but the second did not. The frontier between the stipendiaries in the county of London and the justices outside became firmly fixed; any attempt to question its inviolability would be as dangerous as to challenge the Oder-Neisse line. The result is that, if you are caught picking a pocket on Muswell Hill you will appear before the Highgate Bench, but if you carry on your profession unskilfully on Primrose Hill you will be up before the Clerkenwell beak.

This strange system can only be justified if it works well; how good an account of themselves do these little islands of stipendiaries give, scattered about as they are in the great lay sea? The first thing that an observer of the two kinds of courts would notice is that the stipendiary gets through his work at a much brisker pace. He ought to be able to cut out a lot of inessentials: in a receiving case, for example, in which guilty knowledge is the only question at issue, he should be able to prevent a lot of time being wasted over those parts of the evidence which are not in dispute. He should have sufficient experience and toughness to enable him to curtail the exuberance of long-winded advocates when they stray far from the point. If he has decided to acquit, he can deny himself the pleasure of hearing counsel's final speech for the defence (especially as it might make him change his mind). He does not have to call colleagues into consultation on each of twenty successive pleas of guilty to simple drunkenness, before deciding whether the fine should be five shillings or ten. He has no occasion to retire at the end of a contested case (except in very rare instances) in order to deliberate upon his finding. As a result of these advantages (if that is what they are) an average stipendiary would probably get through a specimen list in about half the time of an average lay bench. This is an important thing, but it is not the most important thing. It is certainly better to be quick than slow. But it is better still to be right, even if it means arriving at the right answer slowly rather than at the wrong answer quickly. There was once a clerk to the justices who was very proud of the speed at which his court operated; when he used to boast (to the fearful joy of his audience) that " there is no bench in the county which dispenses with justice quicker than we do " he was speaking truer than he knew.

There are other obvious advantages in having cases tried by professionals rather than by amateurs. Maitland's dictum that the people prefer justices' justice to lawyers' law, even if basically true (which is arguable), must be subject to qualification. You would probably rather have your appendix taken out by a surgeon than by a committee of laymen with a doctor advising from the sidelines ; when a difficult question of law arises a stipendiary ought to be a better tribunal than a lay bench, even though it has the assistance of a legally-qualified clerk. And difficult questions of law do often arise in magistrates' courts. Even High Court judges have found difficulty in steering their course through the multitudinous Cs (condonation, connivance, conduct conducing, collusion) which enliven the proceedings on many a weary afternoon in the domestic court ; if a stipendiary finds it hard to keep to the charted passage, what chance has a lay bench of reaching harbour safely? The record of appeals in matrimonial proceedings show how often (and how inevitably) they have gone wrong.

There is another, more imponderable, factor. A stipendiary may get to know his district so well that he gets " under its skin " in a way few others can. He may refer, sentimentally and even sententiously, to " my people," who " come in all their troubles and pour out their sorrows to him when they will not do so to anybody else " (as a beak wrote eighty years ago). An experienced stipendiary will also acquire a healthy scepticism, which can work in two ways. He sometimes learns to smell out the black sheep among the police, who may have to change their colour or their calling ; though few magistrates would echo the proud (and really rather idiotic) boast of Albert Cluer (successively a metropolitan magistrate and a county court judge) that he could tell a liar by the way he took the oath. On the other hand, if a reeking, lurching, belching, bawling motorist has crashed into a wall, and his explanation is that his condition was due to fatigue and an unhappy love-affair and not to drink, in a stipendiary's court the waves of counsel's eloquence and the defence doctor's expertise will probably beat in vain against an iron coast. In such cases the accused usually elects to be tried by a jury.

All these advantages of the stipendiary system depend upon the magistrate being a good one. If Mr. Fang was sitting, he would be far less disastrous as a member of a bench ; it is unlikely that there would be a majority of Fangs in any given collection of justices. Few would disagree with the evidence given by the present Director of Public Prosecutions to the Royal Commission on J.P.s in 1946 when he said that an incompetent stipendiary (he added, with unnecessary courtesy, " if one can assume that there are such people ") is a worse tribunal than an incompetent bench, because there is comparative safety in numbers. One argument against any large increase in the number of stipendiaries is that the authorities, in making the appointments, would have to dig lower down in the barristerial barrel than would be prudent. Even if the stipendiary is a good one, there are debits to be weighed against the credits set out in the preceding paragraphs. Because of the immense amount of work he has to get through, and the speed at which he tackles it, there is a danger that he is looking too much at the whole picture and that he misses some of the important personal detail; at times he cannot see the trees for the wood. To a J.P. each case is more of an event. He sits comparatively seldom; he takes longer over each case; he has more time for observation, reflection and consultation; he is more likely to remember it when it is over. A stipendiary in the juvenile court dealt, over a period of several weeks, with a most complex and pathetic " care and protection " case. He then forgot all about it until his successor as chairman (a lay justice) rang him up to say " You must go to see Alan; you are the only person whom he likes and trusts." The incident demonstrates both the virtues and the vices of the stipendiary's methods. He deserved both a bouquet and a brickbat—the first for so successfully gaining the boy's confidence, and the second for forgetting him when he had finished with the case.

Increase in the amount of work for magistrates

Any general question of whether professional or amateur magistrates are best is of academic interest only. The *status quo* will not lightly be abandoned. There is no danger of the whole country being flooded with " corrupt jobbers and odious tyrants " (which is what the genial Sidney Smith thought paid magistrates would be). Nor is there any likelihood of the existing stipendiaries being liquidated. With the volume of work at its present level, the difficulty is for the combined resources of both kinds of magistrates to keep on top of it. This is due less to the crime-wave than to the motor-car. The roads and towns of England are clogged and strangled by cars, and the courts of England are clogged and strangled with cases about cars. Visit a remote rural petty sessions in the hope of hearing romantic cases about poaching or bad husbandry—you are more likely to spend an enthralling morning listening to forty summonses for excessive speed. Go into the magistrates' court in a seaport, with the expectation of seeing Scandanavian smugglers and Levantine stowaways shuffling into the dock—the odds are that you will see no defendants at all, but that you will hear fifty statements of fact in obstruction cases and letters in mitigation read to the weary tribunal. It is all frightfully boring, and the adjudication in such matters could safely be left to anyone who can count up to five. This is a cross that every magistrate has to bear; nor is there any prospect of relief, until the internal-combustion engine is abolished as a result of international agreement, or (as seems more likely) of international disagreement.

The prospect of a substantial reduction of the amount of business in the summary courts is not good. An extension of the number of indictable offences triable summarily with consent would effect a substantial reduction in the pressure of work in some courts. At present the magistrates can try a man for stealing an elephant but not a sheep; a complex case of false pretences, involving thousands of pounds, can be tried summarily; but if a youth opens the window of a kiosk, and helps himself to a packet of cigarettes, this grave matter, after a solemn taking of depositions in longhand, has to be sent to the sessions. Audacious spirits have expressed doubts as to whether these arrangements embody the last word in legislative wisdom.

Meanwhile both lay and stipendiary magistrates must soldier on, each kind no doubt convinced that it is a little better than the other. The existing irrational system (despite the overload) works with tolerable efficiency, and everyone seems to be agreed to leave fairly well alone for the present. As to the future, the 1948 Royal Commission thought that stipendiary and lay magistrates should be encouraged to sit together. History has been against this, particularly in London. The first metropolitan magistrates were regarded as interlopers by the J.P.s; in their turn, they thought of themselves as cleansing the Augean stables inhabited by the trading justices. Lay was lay and professional was professional; more recently the twain have met, and without disaster. There are now domestic proceedings courts in London in which a presiding metropolitan magistrate sits with two J.P.s—whom he sometimes finds surprisingly helpful; when some of the London beaks returned to preside in the juvenile courts after the Second World War, they were discovered by their lay colleagues to be less awful than had been feared. While the stipendiaries will continue to do the bulk of their work sitting alone, it may be that more occasions will be found on which the professional lion and the amateur lamb can lie down happily together.

The Juvenile Courts

By Barbara Wootton

While the justices of the peace are celebrating their six hundredth birthday, the English juvenile courts are only a year or two past their jubilee. Not until the Children Act of 1908 were juvenile courts established throughout this country, though it was already customary in several towns to hear cases concerned with juveniles [1] at special times or in special courts. In this respect Scotland, as so often, had led the way, with juvenile courts functioning in about a dozen places. Abroad, too, such courts had already been established in upwards of twenty American states, as well as in Canada and South Australia. In all these cases—so Parliament was told when the Bill of 1908 was under discussion—the result of " the separate treatment of children under more sympathetic conditions " had been a " large diminution of youthful crime." [2] Alas for the implied but unfulfilled prophecy that the same would happen here!

In London the original plan was that one of the metropolitan magistrates should act as a peripatetic children's court hearing cases throughout the county. The idea of setting up several separate courts in the London area was dismissed as impracticable in view of the small number of cases expected. A figure of ten new cases a day (or sixteen including remands) was authoritatively quoted as the likely total for the whole of London outside Woolwich and Greenwich. Alas again for the contrast with present conditions! There are now eight metropolitan juvenile courts, each sitting every week, and in 1960 they heard well over 10,000 cases, nearly 9,000 of which were concerned with criminal charges.[3]

In the meantime London has come into line with the rest of the country in that its courts are now, and have been for the past twenty-five years, predominantly manned by laymen with a lay

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[1] The distinction between a child and a young person (that is to say one over the age of 14) has some importance in the courts, if only because the young person still has, but the child has not, the right to elect to go for trial in appropriate cases, and because the consent of a young person is required before he is made the subject of a probation order. For simplicity's sake, however, I have used the terms " child " or " juvenile " in this article to cover both categories in any context in which such distinctions are not relevant.

[2] H.C. Deb., Vol. 186, col. 1260 (March 24, 1908).

[3] I am indebted to Mr. Michael Spiller, Clerk in the Metropolitan Juvenile Courts, for these figures.

chairman presiding. One difference, however, between the metropolis and the rest of the country remains, inasmuch as the magistrates who serve on the London juvenile courts are appointed by the Home Secretary, not, as elsewhere, elected by their fellows; and it is the Home Secretary also who designates which members of the panel are to serve as chairmen. Amongst the latter several metropolitan magistrates are regularly included, each of whom takes an occasional turn in one or other of the courts: but even so an entirely amateur bench is the rule rather than the exception.

The Children and Young Persons Act, 1933

Today the principal statute which governs the constitution and proceedings of our juvenile courts is the Children and Young Persons Act, 1933, as modified and extended by the Children Act of 1948 and one or two later statutes of less importance. Regarded as an exercise in parliamentary draughtsmanship, the Act of 1933 has stood the test of time well: its text is not marred by obscurities and ambiguities, nor has it given rise to many disputed points. Indeed in comparison with some contemporary legislation it reads like a model of lucid English prose.

Nevertheless, behind the clear and simple language of this statute there lurks a fundamental conflict which threatens to become the subject of acute controversy and perhaps even to crack wide open the structure that has been so carefully built upon the foundations laid fifty-three years ago. For on the one hand the English juvenile courts are created in the image of courts of summary jurisdiction and bound by the rules of criminal procedure; and on the other hand they are expressly enjoined to have regard to the welfare of the children who appear before them. In the attempt to discharge both halves of this dual function it would seem that the courts are sometimes required to travel simultaneously in opposite directions.

The dual function of juvenile courts under the Act

As a criminal court, a juvenile court can, of course, only deal with the guilty. But with the characteristic intellectualism of English law, guilt is defined in terms of knowing or understanding the difference between right and wrong. Below the age of 8, the law conclusively presumes that no child has this understanding; while between the ages of 8 and 14 there is a rebuttable presumption to the same effect. A child in the latter age group, therefore, who successfully pleads that he did not know that what he did was wrong must be found not guilty and discharged. Yet the child whose knowledge of right and wrong is underdeveloped for his age is surely the one whose moral welfare most clamantly calls for attention. As Dr. Glanville Williams forcibly argued in this *Review* some seven years ago, "the more warped the child's moral standards, the safer he is from the correctional treatment of the criminal law."[4]

This conflict between the judicial and criminal and the welfare functions of the courts runs through nearly everything that we do. In sending a child to an approved school, for instance, most magistrates are conscious of the paradox which obliges them to say in effect: "Because you have behaved so very badly, we are now going to send you away to school; and this will be the most magnificent opportunity in your life." Certainly in visiting approved schools, particularly those which cater for children of superior intelligence, in which staff-student ratios reach figures undreamed of in any comparable day school, I have often found myself thinking sadly of all the non-delinquents or undiscovered delinquents who are denied similar opportunities.

Suggested reforms

After fifty years' experience, therefore, it may well be time for second thoughts. Broadly speaking, two alternative courses (with various compromises between them) are open. The first is to retain the essential status of the courts as part of our judicial system with or without certain modifications. The other is to raise the age of criminal responsibility and take the children, or at least the younger among them, right out of the courts altogether.

The arguments against the retention of criminal procedure are easily stated; and few, probably, of those who serve in any capacity in the juvenile courts can fail from time to time to be irked by the inappropriateness of this procedure for the very young. Simplify the language and the formalities how one may, the extreme artificiality of any criminal trial must be utterly incomprehensible to small children. To be invited to cross-examine the policeman who has arrested you, and then to be pulled up as soon as you seize this opportunity to burst out with your whole story; not to be allowed to repeat what other people have said; to have to decide whether to give sworn evidence on your own behalf or to make an unsworn statement—what sense can children of 8 or 9 make of this or of the actual recital of the oath itself? A child who is blessed with exceptionally knowledgeable parents, or one who is legally represented, will take the path that he is told to take through this peculiar legal maze, but such children are exceptional; and even to them the rules can have no intelligible meaning.

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[4] [1954] Crim.L.R. 495

On the other hand, in favour of this procedure it is commonly urged that the rules governing our criminal courts have been gradually evolved through centuries as a means of protecting accused persons from injustice: and that a child has as much right to justice as his elders. In a recent debate in the House of Lords, when I was myself urging that children under 12 ought not to be brought before the courts at all, Lord Hailsham interposed with some sharpness to protest that it would not be right to send a child away to a boarding school on the hypothesis that he had stolen, when in fact he had not done so; and earlier in the same debate he recalled how he had himself once defended a child in a juvenile court whom it was proposed to send away, and how this child's story of complete innocence turned out to be true, with the result that he was saved from "permanent damage."[5]

On the face of them such arguments undoubtedly have much force. Understandably they make a great appeal to lawyers, for do not lawyers cherish a special concern for the principles of British justice? Nor can anyone dispute that it is wrong, and that it may cause permanent damage to a child, to punish him for what he has not done: indeed a child's sense of justice is often exceptionally lively. Certainly all possible precautions must be taken to prevent such an occurrence.

Nevertheless in their application to the treatment of the children who now appear before the juvenile courts, I find these arguments much less convincing than I used to do. Excellent though they are in theory, they have failed to withstand the pressure of my twenty years' practical experience in the juvenile courts—experience, incidentally, of a nature which is comparatively unfamiliar to lawyers, since few of the children who are charged in these courts are professionally defended. Anyhow, as I now see it, the weakness of these arguments lies in their implicit acceptance of the essentially punitive nature of the court's function, and in their failure to distinguish between the measure of control which an adult and a child normally exercise over their respective lives. When an adult is charged with an offence, everything turns upon the facts of the particular case at issue. If he is guilty, he may be deprived of his liberty; if he is acquitted, he retains the freedom to manage or mismanage his life as he may think fit. Plainly it would be monstrously unjust to interfere with this freedom if he has not in fact committed the offence with which he is charged.

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[5] H.L. Deb., Vol. 231, cols. 461, 455, May 15, 1961. How defence counsel was able to anticipate the sentence before the finding of guilt is not apparent.

That, at any rate, is our law. Even the Mental Health Act of 1959, with its elastic provisions for the detention of psychopaths, restricts the application of these powers to persons under twenty-one. A child, however, does not enjoy a comparable freedom. Inevitably children are, and must be, subject to endless compulsions in matters great and small. They are compelled to go to bed at a prescribed time, to get up, to go to school—to the school of someone else's choice—to live where their parents choose to live and (some of them) to say "please" and "thank you." Their right to work, like their right to enter pubs, is closely restricted or forbidden altogether. But none of these compulsions is, in itself, punitive. No one suggests that a child ought to have the right to appear before a court before he is compelled to go to school at all. (That he has a right to judicial process before he is punished for not going to school is an altogether different matter.) Why then should judicial process be required before a child can be sent to a different kind of school? Every day children are sent away to boarding schools (as Lord Hailsham himself no doubt was sent to Eton) not because they have stolen something, but because their parents think that this will be the best education for them. The decision may be right or may be wrong: but it is not punitive. It is based on consideration of the child's welfare and conduct as a whole, not on the specific issue of whether he has or has not committed a particular action. If he is consulted on the matter his own views may or may not prevail; but only in very unusual circumstances will he see an unwelcome decision as a punishment, still less as a punishment for something that he has not actually done. In short, if the welfare, not the punishment, of the child is the governing consideration, the safeguards of the criminal trial become irrelevant: that is the crux of the matter.

The Ingleby Committee's proposal

However, for those who fear to loosen the shackles of judicial procedure too far, the Ingleby Committee [6] has recently come up with a compromise proposal. Under this, the age of criminal responsibility would be raised from eight to twelve; but at the same time a child of any age, even below twelve, might be brought before the court as in need of "protection or discipline"; and it would then be open to the court, if satisfied as to this need, to deal with him in any of the ways in which a child of eight years or upwards can at present be dealt with under "sentence" if "found guilty" on a criminal charge. Thus the courts, it is argued, would "move further away from the conception of criminal jurisdiction." Indeed the suggested procedure could not, in the Committee's view, be adequately described as either "criminal" or "civil," as those terms are generally understood in legal parlance. The Report does, however, adhere uncompromisingly to the principle, which is of course of the essence of any judicial procedure, that specific and definable matters must be alleged, and that there should be no power to intervene until those allegations have been satisfactorily proved. The maintenance of this basis, it is said, "is essential if State intervention is to be fitted into our general system of government and to be acceptable to the community." In other words the child against whom specific allegations cannot be proved would still be entitled to "get off." But at the same time the role of *doli incapax* would be abolished, mainly on the ground that, although "knowledge of right and wrong" is a singularly difficult conception to apply to children, nevertheless arguments about knowing right and wrong can properly be used in relation to a child before he is sufficiently independent "to be saddled with a permanent personal responsibility."

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[6] Committee on Children and Young Persons, *Report*, 1960, Cmnd. 1191.

For all its ingenuity this seems to me to be a most unsatisfactory compromise. The nettle may have been lightly fingered, but it has certainly not been grasped. Indeed the Ingleby proposal could fairly be described as a device for putting the age of criminal responsibility up with one hand, and putting it down, at least in fact, if not technically in law, with the other. For under this scheme a child of twelve who is accused of stealing would be brought before the juvenile court to answer a criminal charge as at present; while a child of eleven (or even less) against whom exactly the same facts are alleged would be brought before the same court as in need of protection or discipline. In both cases any subsequent action would depend on proof of the specific events alleged. The only difference is that, whereas the older child is "charged," the younger one is alleged to have "acted in a manner which would render a person over the age of twelve liable to be found guilty of an offence." What the children or their parents would make of this distinction is anybody's guess. But they would hardly be likely to think much of it when they discovered that the powers of the court to deal with the two children (as by sending them away to an approved school) are substantially the same in each case. Indeed if the Committee's own injunction to the court to be at pains to explain to both parent and child just what it is doing and why it is doing it is to be taken seriously, such a situation is likely to tax the expository powers of even the most accomplished bench to the full.

The plain truth is that even if this procedure is not in the strict sense criminal, it is essentially punitive; and yet the traditional safeguards against unjust punishment are appreciably weakened. What for instance is to be the standard of proof in this hybrid jurisdiction which is neither criminal nor civil? If, as seems likely, we are to accept the standard applicable to the present civil proceedings in "care or protection" cases, then the child will lose the protection afforded by the "beyond reasonable doubt" formula. Moreover, under the suggested procedure, even though no plea is to be taken, the police will not "normally" be required to support their evidence by that of other witnesses; though in the event of dispute the case may be adjourned for further evidence. Yet as a result of these peculiar proceedings, a child even below the present age of criminal responsibility could be subjected to any of the punitive consequences now attaching to proof of a criminal offence. So far, at least as I can see, there is nothing in the Ingleby plan which would prevent a court from sending a child of seven (or even one younger still) to a month's punitive detention in a remand home. The operation would have to be called "sending" not "sentencing": that is all. But if this is so, it is surely a wry pretence to talk of the age of criminal responsibility being raised.

The Ingleby compromise seems, therefore, to embody the worst features of both worlds. In its zeal to maintain the judicial proprieties, it fails to remove much of the artificiality of present procedure (including the oath, which surely could be dispensed with in juvenile courts, at least for schoolchildren): and in an approach which is fundamentally punitive it increases the risk of unjust punishment.[7]

Raising the age of criminal responsibility—an educational rather than a penal solution

There remains the alternative course of removing the younger children out of the ambit of the courts altogether, as the Scandinavian countries have done, by raising the age of criminal responsibility in fact as well as in law. It is true that this means driving a coach and horses through the safeguards attaching to criminal procedure, with which the Ingleby Committee tampered only here and there. But, as I have tried to point out, these safeguards are inextricably related to a *punitive* judicial process. It is only because the approved school, the probation or supervision order and the attendance centre are inherently penal institutions, because they are places of punishment the road to which lies through the courts, that a specially elaborate procedure is necessary. Substitute an educational for a penal setting and the need for that procedure will disappear. For why otherwise do we mostly (and rightly) assume that in the case of our own children we can ourselves with the help of the schools (and perhaps in difficult cases also of a child guidance clinic or psychiatrist) make a passable job of training them to keep the complicated rules of adult society? In the case of our own children, of course, we see the job in educational, not in penal, terms. Juvenile courts, we presume, are for other people's children, not for ours. Yet what goes for us can surely go for others, too. Granted that for the exceptionally difficult child or for the one whose parents neglect their responsibilities, special help, or even education away from home, may be indicated. That too can be provided in an educational, not a penal, setting. Why, for example, should not probation officers (under another name) be attached in their work with juveniles, not to courts, but to schools, giving their counsel and advice to children referred to them by parents or teachers? At least we should then avoid the court appearance which so often adds nothing but initiation into the delinquent community.

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[7] As witness the Report's continual references to "punishment or other treatment." Punishment is always given priority.

Within the limits of one short article, the practical implications of *effective* raising of the age of criminal responsibility cannot be fully worked out. But one or two likely misunderstandings can be cleared away forthwith. First, although logic would demand that the age of criminal responsibility and the age of emancipation from the educational process should essentially be the same, an immediate raising of the age of criminal responsibility to fifteen would, alas! hardly be practicable. Overworked teachers cannot be expected to do more; and in a community genuinely prepared to treat its children not as criminals but as educational subjects, all those agencies—approved schools, attendance centres, along with the services of probation officers and others—which specialise in the problems presented by difficult children would need to be integrated, both spiritually and administratively, into the normal educational process. This cannot happen in a day; but it might happen rather quicker, if it was known that, little by little, liability to criminal process was to be steadily postponed to later ages.

Secondly, I do not forget that parents also have their rights. In the protection of these the judical process must always have an important place. In every case in which it is proposed to remove a child from home against its parents' wishes, an appeal to the courts should remain. Given, however, proper consultation between schools, welfare agencies and parents, such cases are not

likely to be numerous. Even today many parents concur in the decision to send their children to approved schools; and once these schools lose their penal label and are absorbed into the general educational structure, the objectors are likely to be fewer still. For what the parents fear is not so much the departure of the child from home as the disgrace of his having been " put away." One " goes " away to school: only in a penal institution is one " put away."

Fifty years ago the primary need was, no doubt, to get the children away from courts in which they rubbed shoulders with adult offenders and professional criminals. Where these children were to go to may well have seemed a secondary matter; though even then the choice between the judicial and the "welfare" approach was open, and Norway, Sweden and Denmark had already opted for the latter. Fifty years ago, however, hardly a scrap of the elaborate system for dealing with difficult children which we have today had been invented. Things are dramatically different now. Today the variety of facilities available outside the judicial machine for dealing with the problem child or the child with a problem is positively dazzling. In face of this luxuriance it is hard indeed to believe that it can still be necessary to bring such children before the courts. For the problem child of today there are child guidance clinics; special remedial classes; boarding schools under the Education Acts; schools for the malajusted; schools for educationally subnormal. Alternatively, under the Mental Health Act such a child may be diagnosed as subnormal; or as severely subnormal; or as suffering from psychopathic disorder and dealt with appropriately in each case. Surely there must be a place, in this elaborate health-and-education framework for even the most recalcitrant youngster.

Perhaps if the juvenile courts had had the success originally anticipated, one might think differently about all this. But where is the " large diminution of youthful crime " so confidently foretold at their inauguration? All too plainly something has gone wrong somewhere.

Modern History of the Appointment of Lay Magistrates

By J. M. Lee *

It is a well-established convention of English public life that considerations of social class, religious belief and political patronage shall not be disclosed when a personal appointment is being made. Few subjects come so clearly under the ban as the nomination of lay magistrates to the bench. Yet there have been few occasions during recent debates on the office of justice of the peace when these three subjects—class, religion, and politics—have not dominated all discussion of reform. A natural reticence to enter into a public examination of individual personal qualities, combined with a recognition of their tremendous importance, provides the theoretical basis for a system of appointment by anonymous advisory committees in each county and borough. For the last fifty years the Lord Chancellor has been placing names in the commission of the peace on the advice of a local advisory committee which is not called upon to defend its choice. The composition of each committee is not public knowledge, and the chairmen, members, Lords Lieutenant and their clerks are expected to keep their own counsel.

The local advisory committee—a secret body

The requirements of secrecy arise from the apparently delicate nature of the whole selection process for candidates in this kind of preferment. There are two grounds for justifying this policy by an appeal to history. In the first place, social class is no longer the sole criterion for qualification as a magistrate. The office of justice of the peace belonged naturally to a society in which political power was a function of social status, and in which the maintenance of law and order was a prerogative of the upper classes. The demand for popular representation, for members of Parliament and local councillors to be elected on a universal suffrage, the main issue of nineteenth-century politics, changed the whole conception of a lay magistracy and required a justification of the system which recognised social change. The belief that a private committee can select representatives from different classes encourages an atmosphere of secrecy. In the second place, there

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* Assistant Lecturer in Government, University of Manchester.

is no longer a fairly clear division between the society of the towns and the society of the countryside. Instead, candidates for the bench must be chosen from men who serve a bewildering variety of economic interests and professional associations, which correspond in no way to the former élite of borough merchants or the former county society of landed gentlemen. The private negotiations of advisory committees are believed to secure an adequate representation of all interested parties more fairly than any method of election. As an institution, the lay magistracy has therefore survived two of the greatest forces in nineteenth-century history, the democratic movement for popular representation and the process of urbanisation, but only by surrounding itself with an impenetrable hedge of convention which raises an obstacle to academic inquiry.

Comparison with the autonomy of chief constables

The administrative irresponsibility of an advisory committee, its freedom from public questioning and its security from dismissal, might be compared to the authoritarian position held by a chief constable.[1] Both owe their relative independence to the same historical forces which transformed the nature of the British state during the nineteenth century. The co-operation between the present lay magistracy and the professional police is vastly different from the machinery for the maintenance of public order which operated during the 1830s and 1840s when the violence of the Chartists disturbed the peace of the countryside.[2] The magistrates during the eighteenth century played the role of the chief constable in issuing orders to the police.[3] The change which has taken place involves greater direct participation of the central government in local affairs and also the increased professionalisation of the means which local people have at their disposal. In the early nineteenth century the magistrates and the police were amateurs. The unrest caused by popular reform movements and the great increase in the size of towns, the very phenomena that brought the lay magistrates into question, were in effect the cause of the professionalisation of society. The same political forces which preferred to arm the chief constable with considerable powers, rather than to trust in an elective office, provided the arguments for selecting magistrates through informal and private channels.

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[1] B. Keith-Lucas, "The Independence of Chief Constables," in *Public Administration*, Vol. 38 (1), Spring 1960, pp. 1–11.

[2] F. C. Mather, *Public Order in the Age of the Chartists*, pp. 57–58. See also Radzinowicz, *History of English Criminal Law*, Vol. 2, p. 224.

[3] See Radzinowicz, *op. cit.*, *supra*, Vol. 3, Introduction, pp. 1–8, and p. 127 (on the Middlesex Justices' Act, 1792).

The role of the advisory committee

The advisory committee system is an accepted part of the machinery for law and order. The Royal Commission on Justices of the Peace (1946–48) raised no fundamental objections,[4] and the Justices of the Peace Act, 1949, which implemented the majority of their recommendations was described as a " non-party " matter.[5] But why has the lay magistracy survived into the era of popular representation, and survived with this curious system of appointment? The answer to this question lies in the compromise achieved between the necessities of party politics and the requirements of professionalisation. The advisory committee is a device to remove disputes about class, religion, and politics from the field of judicial action.

Municipal reform and urbanisation

The movement for popular representation in government and the making of large towns raised new problems for the administration of justice by a lay magistracy. Before these developments, the arrangements for law and order were comparatively simple: the bench of magistrates in those boroughs which enjoyed their own commission of the peace, aided by borough police forces which they appointed; and the bench of quarter sessions in the counties, aided by elected constables, the militia, or in an emergency, regular troops. Borough magistrates were selected according to the terms of the borough charters, and county magistrates were appointed by the Lord Chancellor on the recommendation of Lords Lieutenant. This was the system of " local " government which German scholars were to admire as the essence of English democracy.[6] It rested upon the basis of a common social class, merchants and tradesmen in boroughs and landed gentlemen in counties; it contained a bias in favour of the Established Church; and it depended upon local agreements in political patronage for its effectiveness. In the eighteenth century it was accepted that the high social status of the magistrates was the best safeguard against corruption.[7]

The municipal reform movement challenged the simplicity of this system. The reformers wanted to open the municipal corporations to popular election, and regarded the borough bench of magistrates with its powers to police the town as a great source of political corruption. The lay magistracy remained supreme in the countryside. Trollope's political novels describe almost eighteenth-century conditions of government in the counties, and even in the 1860s and 1870s the "county magnates" were still controlling elections in county divisions.[8] But by the middle of the nineteenth century the great towns, Birmingham, Manchester, Newcastle and their like, had achieved predominance in the economic life of the nation, and it was the height of ambition for every growing borough to secure independence of the county in which it lay. There were three kinds of boroughs: those which had their own quarter sessions and were therefore independent of the county—the equivalent of modern county boroughs—those with their own commission of the peace but still subject to the county justices; and those without either quarter sessions or a commission. This ranking of boroughs is the origin of the local government hierarchy of authorities, within which any expanding community seeks promotion to a higher status. The Home Office files are full of petitions from small industrial towns which in the late nineteenth century asked for a separate commission of the peace.[9] A "boom town" like Birkenhead, the population of which rose from 33,000 in 1851 to 112,000 in 1901, received a commission of the peace in 1878–79, a quarter sessions in 1882 and therefore became a county borough under the Local Government Act of 1888.[10] The industrial town presented in a new form the three factors—class, religion and politics—which were involved in the appointment of magistrates. First, the new middle classes of the towns were clamouring for representatives in established institutions. Secondly, the nonconformist sects were stronger in the towns to challenge the social supremacy of the Established Church.[11] Thirdly, the industrialists refused to accept the political leadership of "county society." The country gentlemen may have been able to control the political life of an eighteenth-century market town and represent it in Parliament, but a rapidly growing industrial city, with the electorate on an increased franchise, was unlikely to select its representatives from the country gentry.

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[4] Cmd. 7463, pp. 16–23.

[5] H.C. Deb., Vol. 470, col. 811.

[6] Redlich and Hirst, *Local Government in England* (1902) attacked the German view popularised by Gneist.

[7] J. Steven Watson, *The Reign of George III*, p. 47.

The Municipal Corporations Act, 1835 and borough magistrates

The objectives of the municipal reform movement were embodied in the Municipal Corporations Act of 1835. It marks the first stage in the adaptation of the lay magistracy to modern conditions, but it did not make the justice of the peace in the boroughs an elected office. This reform, which affected about 250 boroughs, placed the system of appointment in the hands of the central government.[12] The King had always had the power to revoke borough charters in order to reconstruct the town council and hence the bench of magistrates, but it was last used as a serious political weapon by James II. By the 1835 Act, magistrates were to be appointed by the Lord Chancellor after the Home Secretary had considered any representations which had been made to him, particularly by the town council itself.

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[8] H. J. Hanham, *Elections and Party Management*, pp. 2–5.

[9] Public Record Office, H.O. 45, Registered Papers (old series).

[10] The borough was also served by stipendiary magistrates between 1886 and 1896.

[11] The religious census (1872–73) carried out by *The Nonconformist* claimed to demonstrate the urban supremacy of nonconformity.

The ministry in office was therefore expected to make sure that on the bench of each borough there was a fair representation of interests. It replaced in many boroughs the great political patron who had held the office of Recorder. The aristocrat who secured the borough charter from the monarch could make the office of Recorder almost an hereditary one for his family. The Recorder was chairman of the bench and could appoint his own deputy who might well be his steward or political manager. The 1835 Act also placed the appointment of Recorders in the hands of the Home Secretary. The replacement of local patronage by ministerial power courted the possibility of another danger, the patronage of the local political party. The ministry in office was compelled to listen to the requests of its own supporters in the provinces. This danger became more obvious as the gradual extension of the franchise increased the number of voters and called for new methods of electioneering. But this new means of appointment secured greater representation for various classes and for nonconformists.

The Home Secretary therefore after 1835 presided over the government of expanding boroughs, keeping an eye on the interests of his own party. He was in a position to decide when any particular borough should be freed from its tutelage to county administration. He governed the appointment of Recorders and magistrates. It is not surprising that, in these circumstances, the first stipendiary magistrates were his agents, even his spies.[13] The office of stipendiary magistrate was designed to replace the lay magistracy in densely populated areas where there was the greatest incidence of crime. It was in the urban areas that the first successful alternative to a lay magistracy was tried.

Appointment of magistrates in the counties

The territorial expansion of the boroughs was only possible at the expense of the administrative counties. The Lords Lieutenant and quarter sessions of counties which lay close to the areas of expanding population were placed on the defensive. The ministry also enjoyed the patronage of recommending to the Crown the names of gentlemen who might fill the lieutenancies which fell vacant during its term of office. The Prime Minister usually nominated one of the supporters of his own party in the House of Lords who had an estate in the county which he was to administer. By convention, the authority of the Lord Chancellor in making appointments to the commission of the peace was then delegated almost totally to the Lord Lieutenant. He exercised his discretion in recommending names to the Lord Chancellor, frequently after consultation with other gentlemen. This system worked comparatively well, in spite of the natural bias given by the local gentry in matters of class, religion, and politics.

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[12] 5 & 6 Will. 4, c. 76, s. 98.

[13] Mather, *op. cit.*, pp. 67, 73, 183.

The system of county appointment was not amenable to the pressure of an elected council, and the whole attention of the movement for popular representation after the 1870s, particularly in the spirit of the campaign for land reform and small-holdings for the landless labourer, was directed towards representative institutions in the counties. The land problem was worst in Ireland, and the class dominance of the magistrates worst in Wales. The spirit of Irish and Welsh nationalism provided the impetus for reform. England, Ireland and Wales were under the same system of administration, and no reform of local government in the first was possible if it did not at the same time satisfy the aspirations of the other two. The magistracy in Ireland and Wales, which consisted largely of Englishmen, was alien in national culture as well as in class, religion and politics. The situation in these countries drew attention to the class division in English counties.

Political factors

When the enfranchisement of the agricultural labourer in 1884 was followed by the Home Rule crisis in 1886, and the creation of County Councils in 1888, the question of the appointment of magistrates was continually under discussion. It became a source of violent party warfare because one of the results of the Home Rule crisis and Gladstone's espousal of Home Rule for Ireland was to alienate the property-owning classes from the Gladstonian Liberal party. The majority of Liberal county magistrates turned Unionist. Of the twenty-six Liberal Lieutenants at the beginning of 1886, at least fourteen had become active Unionists by the end of the year. The Gladstonians were therefore naturally anxious to "redress the balance" by securing a higher proportion of new nominations to the bench, and they naturally entertained notions of replacing the system of nomination by one of election. The success of the Conservative and Unionist party in remaining in office for the greater part of the time between the General Elections of 1886 and 1906 frustrated Gladstonian efforts. The tension between the parties was increased by the deliberate policy of encouraging old Lieutenants to resign and appointing young ones in their place. The Marquess of Abergavenny promoted this scheme to ensure a Conservative majority among the Lieutenants even if the Liberals were returned to office, and tried to persuade the Prime Minister, Lord Salisbury, to use the offer of a Lieutenancy as a bait to secure the entry of Liberal Unionists into the Conservative party.[14] The Gladstonian demand for greater representation was directed against the class, religious and political beliefs of the Lords Lieutenant. In practice, it was a demand for more working-class, more nonconformist and more Liberal justices. It became class warfare with a vengeance; the cry was raised of the Peers *versus* the People.

The brunt of this attack fell naturally upon the Lord Chancellor who was nominally responsible for all appointments to the bench. Lord Herschell, the Chancellor in Gladstone's fourth ministry, responded to the demands of the government's supporters by announcing in 1893 his intention of making appointments to the county benches from lists of names other than those recommended by the Lords Lieutenant. In deciding to flout convention in this manner in order to nominate Liberal magistrates (the Lord Chancellor was perfectly within his rights. Similarly, the Chancellor of the Duchy of Lancaster, who by convention merely confirmed the recommendations made by the Lord Lieutenant of Lancashire, decided to make his own appointments.[15] If a Gladstonian Liberal ministry had therefore survived after 1895, it is extremely likely that the Lord Chancellor would have used the sovereign powers of the Crown in the appointment of magistrates as a party weapon with which to outwit the Conservative policy of securing a preponderance among Lords Lieutenant. The Lord Chancellor might have been established as the governor of the counties as the Home Secretary had been established in the boroughs after 1835. But in 1895 the Conservative government returning to office reverted to the traditional system of appointments by Lords Lieutenant.

The Campbell-Bannerman ministry which was confirmed so successfully in office by the Liberal landslide of the 1906 General Election was therefore under an immediate obligation to propose reform. It gave its support to one of the measures demanded by the Radicals, the abolition of the property qualification required of county justices. They hoped that this measure would allow men of all classes to be nominated for the bench. But the system of appointment remained. The new Lord Chancellor, Lord Loreburn, solved the problem by appointing a Royal Commission,[16] making to it his own recommendations, and when they had been accepted, acting upon them without any further reference to Parliament. He adopted the device of the advisory committee. This required no statute but only an alteration of convention. Instead of accepting the advice of the Lord Lieutenant alone in making county appointments, the Lord Chancellor was henceforward going to be advised by a special committee upon which local interests were represented. In 1907 Lord Loreburn had encouraged the Lord Lieutenant of Devon, Earl Fortescue, one of Mr. Balfour's appointments, to experiment with this device.[17] The latter chose the following to constitute his committee: Lord Clifford of Chudleigh, a barrister; Mr. G. C. Davie, Chairman of the North Devon Conservative Association; Sir Harry Trelawney Eve, a Chancery Division judge; and Mr. T. H. Hepburn, the Chairman of the Tiverton Division Liberal Association.[18] In 1911 after the Royal Commission had reported, Lord Loreburn began the work of universalising this formula for all counties and even extended it into the boroughs.

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[14] Salisbury Papers.

[15] For further details, see *Parliamentary Affairs* XIII (1), 1959–60, pp. 88–91.

Reasons for the survival of the lay magistracy

The lay magistracy survived the impact of the movement for popular representation and the making of the great towns because it was expected to perform only limited functions in the new situation. Before 1835 in the boroughs and 1888 in the counties, the magistracy was not only a means of settling disputes and judging the penalties for petty crimes, but also a system of local government. The functions which the magistrates performed in the eighteenth century were the functions of the new local authorities in the nineteenth—boards of health and improvement commissions as well as poor law unions and town councils. Professional bodies were alone capable of dealing with the new conditions of life, and the bodies of gentlemen amateurs who sat on the bench were required to stand aside.

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[16] Report (Cd. 5250), 1910, xxxvii.

[17] *Ibid.* p. 124.

[18] From information collected by Mr. R. A. McKinley, formerly Exeter City Archivist

The real question of reform of the magistracy was therefore a dispute over the nature of the new professionalism. Was it necessary to take the whole of the system for the administration of justice into the hands of full-time professionals? The establishment of metropolitan magistrates was essential for the London area, and the need for a regular system of stipendiary magistrates in the provinces was recognised by the Act of 1863. Some politicians were prepared to see the lay magistrates abolished altogether and replaced by professionals, and indeed some saw this as the only alternative after 1886 to making the magistracy a victim of party warfare.

The chief motive for retaining laymen was a belief in the value of common participation in government. Not only did the county gentry wish to preserve their local autonomy, but also the merchants and tradespeople of the towns accepted the idea of the lay administration of justice on the same grounds as they accepted trial by jury. The more radical advocated elected magistrates, either directly or indirectly by the borough and county councils. But elected magistrates came into existence only in a temporary form. The 1835 Act contained a provision that the mayor of a borough should be an "ex-officio" magistrate during his year of office and for the year following. The same principle was applied to the County Councils Act of 1888 and the District Councils Act of 1894, by making the chairmen of these new councils "ex-officio" magistrates during their term of office.

The attributes of a good magistrate

The layman's place on the bench could only be retained by coming to terms with professional requirements. The party managers were compelled by circumstances to realise that the new functions required from the magistracy implied that candidates for the bench should possess certain personal qualities of fairness and uprightness of character. It was not sufficient to be a good party worker in local government. The separation of the administration of justice from local administration in general gradually drew attention to the peculiar difficulties of the former, which had been hidden while the magistrates were chosen largely on their social status alone.

Present-day appointment and training

Advisory committees were therefore welcomed as a device leading towards the professionalisation of the magistracy. Between 1911 and the time of the second Royal Commission on Justices of the Peace, 1946–48, which resulted in the 1949 Act, the principal items for discussion centred round the need for avoiding unsuitable candidates in party nominations and for providing adequate training for new recruits. The emphasis of the Royal Commission report in 1948 was on the composition of the advisory committee as a "cross-section of society," which did not regard itself as representing political parties but which in making appointments considered that "the person's fitness for the discharge of judicial duties" was of paramount importance.[19] The emphasis of the 1949 Act was on the provision of an adequate apparatus for the training of magistrates in the form of Magistrates' Courts Committees. Of the Commissioners, only Lord Merthyr was willing to contemplate the complete professionalisation of the service.[20]

The Lord Chancellor and his Secretary for Commissions now preside over an informal organisation which, with the help of local advice, is supposed to discover suitable candidates from the lists submitted by private persons and political organisations. New recruits are encouraged to join the Magistrates' Association and given some guidance by the Magistrates' Courts Committees, and the publications, *The Magistrate,* and the *Justice of the Peace.* The Magistrates' Association also provides correspondence courses and week-end schools. This is a combination of the gentleman amateur tradition and the demands of professional training. Even the Lords Lieutenant are organised into an association for the discussion of common problems, a situation unthinkable before 1906. The difficult subjects of class, religion and politics, which have always been part of the history of the office, are now submerged within this semi-professional world and suitably disguised by the confidential nature of the proceedings. If the lay magistracy is abolished, it will involve some change in the taboo of English society. The operation of this system is really the field of the anthropologist rather than the lawyer or historian. It is one of the ways in which social conflicts are resolved—the choice of a justice. Future discussion may lie with the field worker who carries a tape-recorder into local committee rooms, or pitches his tent outside the House of Lords.

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[19] Report (Cmd. 7463), p. 87.

[20] *Ibid.* p. 99.

The Evolution of the Justices' Clerk

By Stanley French, M.A.*

Clerks to justices, unlike those they serve, are not a conception of the central government brought to birth in a statute. They are a natural growth. They began as stewards, bailiffs, estate-clerks and others with some writing ability whose employers happened to be in the Commission and therefore sometimes enlisted their help in such tedious tasks arising from the duties of a justice of the peace as keeping records, making returns and preparing documents. Mr. Justice Shallow's servant Davy was one such. " Marry, sir, thus," he tells his employer (Henry IV, Part 2, Act V, Sc. 1), " Those precepts cannot be served ; and again, sir, shall we plant the headland with wheat? "

As they began, so they continued for nearly five hundred years. The work of justices' clerks increased enormously in volume and in variety and there were changes in the type of men employed to do it, but until the nineteenth century the relationship of justice and clerk remained a strictly personal one.

In every county, however, there was one clerk who achieved official standing almost at once. Individual justices had not so many duties that they could not manage without a clerk but when they met together in quarter sessions help was essential to prepare the writs, precepts, processes and indictments to be put before them and to record the escheats or records of sentences. These duties were placed upon a justice named in the Commission as *custos rotulorum*, but it was not to be expected that one of the " most worthy in the county " would himself perform them. He nominated a deputy to do so, perhaps his own servant or the servant of a fellow justice, perhaps someone he wished to favour or one of the men whose willingness to act for others in legal matters was laying the foundation for the development of the profession of attorney and solicitor.

That it was proper for the *custos* to delegate his duties is apparent from the Commission of 1380, which required the justices to administer to their clerk an oath " to conceal the counsel of the king and to perform his duty loyally," from the statute of 1388 (12 Ric. 2, c. 10) which provided that justices should receive four shillings and their clerk two shillings for every day (not exceeding three) that they sat in quarter sessions, and from the statute of 1390 (14 Ric. 2, c. 11) which directed justices to include the name of the clerk in the particulars they sent to the sheriff.

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* Chief Clerk, Thames Magistrates' Court.

The clerk at quarter sessions—the origin of the clerk of the peace

Thereafter the man who sat with the justices in quarter sessions, became, as clerk of the peace, far more important and influential than his humbler brethren who worked for individual justices. In the fifteenth century he sometimes acted as attorney for the king, as an under-sheriff and as a coroner, and was elected to Parliament, and occasionally held his office for life under letters patent from the king. In the first half of the sixteenth century, according to an Act of 1545 (37 Hen. 8, c. 1) which placed the appointment of clerk of the peace solely in the hands of the *custos rotulorum* (as it remained till 1888) many occupants of the office were inefficient and corrupt so that " many indictments have . . . been made clearly frustrate and void, sometimes by reason of the negligent engrossing and keeping of the said indictments and sometimes by the Embezzelling and Rasure of the same indictments." And in later centuries some of the clerks of the peace were so grand or so busy in other appointments that they never themselves performed the duties of their office but appointed a deputy to do so.

Clerk of the peace and clerk to the justices

At no time, however, did all clerks of the peace remain aloof from the work of justices out of sessions. Some also acted as clerks to individual magistrates and to petty and special sessions, when these developed. Not until 1834 was a clerk of the peace prohibited from being clerk to the justices in the same borough; in the counties he was allowed to occupy the dual office until 1857; and as late as 1938 four clerks of the peace in counties were also clerks to the justices in boroughs with a separate commission.

Remuneration

The incentive to undertake both duties was, of course, the remuneration, which outside London was always in the form of fees until 1851, except that the clerk of the peace was entitled to his two shillings each day of quarter sessions until 1855, when the statute of Richard II was repealed by 18 & 19 Vict. c. 126, s. 21.

The first statutory attempt to fix the fees to be taken by justices and their clerks was in 1542 when an Act of Parliament (34 Hen. 8, c. 26) dealing with justices in Wales laid it down that no justice of the peace, clerk of the peace, or other clerk of any justice of the peace should take " for the writing of any warrant of the peace above VId., for writing a recognisance XIId." There was no further parliamentary control of fees until 1753 when by 26 Geo. 2, c. 14, the responsibility for settling them was placed on the justices in quarter sessions, who were to draw up a table of fees to be charged in their county and submit it to the judge at the next assize for his approval. Once the table of fees had been confirmed any clerk who took an unauthorised or excessive fee was liable to be proceeded against for a forfeiture of £20.

Clerks employed by individual justices

The two Acts of Parliament last mentioned are the only two before the end of the eighteenth century which recognise the existence of other clerks to justices beside the clerk of the peace. Nevertheless the need for such clerks steadily increased as the work of the justices expanded. Many clerks continued throughout the centuries to be employed by individual justices in a capacity to which the work of a justice's clerk was incidental; others were engaged specifically as a justice's clerk, although they may have done other clerical work as well. Samuel Butler, the author of *Hudibras*, was one of the latter; round about 1630, according to an eighteenth century biographer, he became " Clerk to one Mr. Jefferys of Earls-Croom, an eminent justice of the peace for that county [Worcestershire] with whom he lived some years, in an easy and no contemptible Service. Here, by the Indulgence of a kind Master, he had sufficient Leisure " to apply himself to learning. He was undoubtedly writing from his experience as a justice's clerk when he declared in *Hudibras*.

" For oaths are th' only Tests and Seals
Of right or wrong and true and false;
And there's no other way to try
The doubts of Law and Justice by."

Clerks to the Commission at large

By the beginning of the seventeenth century, however, another class of justices' clerk was growing—men who were not employed by a particular justice of the peace but were prepared to act as clerk for anyone in the Commission in return for the appropriate fees, or such part of them as the justice was willing to pass on. The only qualification was the ability to write. Legal knowledge was not essential. It could be picked up to some extent as one went along, and from 1591 there was for reference the first of the manuals for justices, Lambard's *Eirenarcha*, which contained forms and precedents, and from 1641 the first textbook for the clerks themselves, Shepherd's *Cabinet of the Clerk of the Justice of the Peace.*

Duties—taking depositions

It was therefore well within the capacity—at any rate in their own opinion—of schoolmasters, parish and vestry clerks, sheriff's officers, even innkeepers, to make out warrants and orders and recognisances from the models given in Lambard and the other textbooks and to take depositions. This last task, sometimes the most wearisome and occasionally the least useful of all the duties undertaken by justices' clerks, was placed on the justices by a statute of 1554 (1 & 2 P. & M. c. 10) which directed that a justice of the quorum or any two justices, " when any person is brought before them for manslaughter or felony, before they are bailed shall take the examination of the said Prisoner and Information of them that bring him, of the Facts and Circumstances thereof, and the same, or as much thereof as may be material to prove the felony, shall be put in writing . . . and that examination, with the bailment, shall be certified by the justices at the next Gaol Delivery within their Commission."

This instruction was extended by a statute of the following year (2 & 3 P. & M., c. 10) to cases where the prisoner could not be bailed. It was usual apparently for only rough notes to be taken at the time, and the last named Act endeavoured to prevent any delay in turning these into a form suitable to be placed before the court of trial by requiring that the examination was to be put in writing within two days.

Justices meeting in divisions

It will be noted that the examination had to be taken by a justice of the quorum (that is, a justice appointed to the Commission because he was learned in the law) or by two other justices. This is an early indication of a development in the organisation of the work of the Commission in which certain functions were entrusted neither to a single justice nor to the justices in quarter sessions but to two or more who met together for that purpose. An account of the development of petty and special sessions is not appropriate to this article. It is sufficient to say that as early as 1544 (33 Hen. 8, c. 10) justices were directed to divide themselves according to their hundreds for the enforcement of the laws against vagrancy, and although this was soon repealed (37 Hen. 8, c. 7) the practice seems to have become firmly established by the seventeenth century of the justices of a convenient group of contiguous parishes meeting by arrangement to act in all matters which could not be dealt with by a single justice, as well as in the special sessions required by the Highway and other Acts. The practice soon received official recognition, as appears from the direction from James I to the clerk of the peace for Derbyshire in 1605 to write to all the justices in the county to instruct them to divide themselves into divisions, so that no one need travel more than seven or eight miles, and then to meet in these divisions once between each general sessions to deal with such matters as the Statute of Labourers, Poor Law, alehouses, prentices and rogues.

Clerks at divisional sessions

The importance of this in the history of justices' clerks is that justices sitting together for these purposes required the help of a clerk as much as they did when they sat in quarter sessions; what they did was far more likely to be brought for review into the King's Courts by writ of certiorari than what they did as single justices, and the records had to be properly kept. The Derbyshire Commission of 1605 recognised this and specifically directed the justices to appoint a clerk to keep notes of their proceedings "at these assemblies, that the cause may be examined and if necessary certified." He was also to act as an attendance recorder and to report to the judge of assize what justices were absent.

The three kinds of clerk

By the early seventeenth century therefore there were three kinds of justices' clerks—the clerks of the peace, the clerks who sat with justices in divisional and special sessions, and the clerks who were privately employed by individual justices.

Sometimes these various offices were held by one and the same man. He was very often an attorney, as by the time of the first Stuarts professional lawyers had become established in most districts and were willing to undertake any sort of legal business in return for fees. It was inevitable that a justice with no personal clerk should seek help with documents, and perhaps information about the law, from such men, that a clerk of the peace disinclined to perform the duties of his office himself should depute the leading attorney in the county town to act in his stead, and that justices in petty and special sessions should call upon the services as clerk of an attorney whom they all knew and had perhaps privately employed.

John Chauncey, of whom Mr. Birks gives an account in *Gentlemen of the Law*, must have been a typical clerk of this kind. In Charles II's reign he was clerk to the Hertfordshire justices and town clerk of Hertford, and towards the end of his career also clerk of the peace for Hertfordshire and under-sheriff.

In 1681 his justices awarded him £10 for his services, which included making public orders and warrants, prosecuting Papists and attending the justices for many years without payment.

On another occasion he was paid £20 for transcribing letters from the Secretary of State, and other business. The Hertfordshire Records from which this information comes also noted that Chauncey bought law books for the use of his Bench.

Fees as sole remuneration—abuses

The dependence of justices' clerks on fees as their sole remuneration (apart perhaps from an occasional *ex gratia* payment such as Chauncey received) was unsatisfactory both for them and for the public.

On the one hand, clerks could never be sure of getting their just dues. Although a good justice of the peace would not dream of taking fees himself there were others who took and kept all they could. In 1717, for instance, the Middlesex justices in petty session openly admitted that they kept all the fees and if their clerk was not paid out of the rates he would get nothing. Other justices charitably remitted the fees their clerk earned. Then some clerks got more than their fair share of fees because their employers acted in several divisions; in 1692 the West Riding Quarter Sessions had to give special instructions to the clerk of the peace to ensure that ale-house licence fees were divided amongst the justices' clerks " share and share alike."

On the other hand the reliance on fees meant a proliferation of legal documents and formalities for which fees could be demanded. Fees of from 1s. to 10s. were charged for every conceivable item of Commission business. Even a vagrant sentenced to be whipped, a poor person applying for relief and a witness bound over to give evidence had to pay the clerk his due.

Some attempt seems to have been made to prevent clerks from being so extortionate. In 1698, for instance, several clerks were indicted at Essex Quarter Sessions for taking " extortive " fees, but mostly the unfortunates from whom excessive fees were extracted were in no position to take action against the clerk. Even after the Act of 1753 required tables of fees to be drawn up by quarter sessions, approved, and exhibited, clerks could still overcharge with impunity the poor, the ignorant and the frightened.

It was the association of such rapacious clerks, particularly in London, with justices of the peace who were themselves only in the Commission for what they could get out of it, or so weak, idle or uneducated that they were tools in the hands of their venal assistants, which brought the justices' clerk out of the mists which had shrouded him in earlier centuries into the clear and critical light of the eighteenth century.

Vice is news, virtue is not, and although no doubt all over the country there were many clerks who were honest, did their duty to the best of their ability, and had, like Squire Western's clerk, " a qualification no clerk to a justice of the peace ought to be without, namely, some understanding in the law of the realm," it was the notoriety of the trading justices and their clerks in London which led to the first statutory provision for the remuneration of justices' clerks by salary instead of fees.

Reform in the metropolis, 1792

This was the Middlesex Justices Act, 1792 (32 Geo. 3, c. 53), which established seven police offices in the Metropolitan areas of Surrey and Middlesex, with three paid justices attached to each, forbade the taking of fees by anyone else, and appointed a Receiver to whom were to be paid all fees and fines taken at the offices, out of which he was to pay the salaries of the magistrates, clerks and other officials. Provision was made for the keeping of books and the inspection of accounts, and the Receiver was made accountable to the Treasury. A similar scheme was applied to the Marine Institution when it became the Thames Police Office in 1800. Each office was given a chief and a second clerk, most of whom were solicitors.

Some of them continued in practice. One even prosecuted in his own court (at Marlborough Street in January 1814) and several were paid to look after the interests of brewers before the magistrates. After 1818, however, no legally qualified men appear to have been appointed until the end of the Second World War; laymen with undivided loyalties took their place and built up a splendid reputation.

The position outside London

Apart from the Metropolitan clerks, justices' clerks continued well into the nineteenth century to be dependent on fees for their income and the favour of individual justices for their position. As late as 1833, it was held in *Re Sandys*, that Charles Sandys, an attorney who had been sole clerk to justices of the St. Augustine's division in Kent since 1814 had no remedy against his summary dismissal, Denman C.J., Littledale and Parker JJ., holding that a clerk to the justices had no legal hold upon his office, which was an office of pleasure (1 Nev. & M. 591).

The clerk's duties and status in the nineteenth century

Parliament, nevertheless, was already taking a different view. So long as a clerk took his orders solely from the justice or justices who employed him he was, as described in *R.* v. *Surrey Justices* in 1826 (D. & R. 1831) "the private assistant of the magistrates," but as soon as statutory duties were placed upon him his status changed. This is what happened in 1825 when the Juries Act (6 Geo. 4, c. 50, s. 10) laid the duty of giving notice of special sessions for settling jury lists upon the clerk of the divisional justices. The year after the *Sandys'* case the Poor Law Amendment Act (4 & 5 Will. 4, c. 76, s. 18) enacted that a copy of every rule, order and regulation of the Poor Law Commissioners should be sent to the clerk to the justices of the appropriate petty sessions for him to keep available for inspection by ratepayers and others. He was to give publicity to them and supply copies at a charge of 3d. for seventy-two words. If he failed to perform these duties he was liable to a fine.

The justices' clerk had therefore unquestionably arrived as a public official with public duties, few though these were at first. Two features of Victorian England helped to establish his position and to define his function. One was the replacement of justices as the principal authority in county government by statutory elected bodies with their own paid officials. The other was the parallel extension of the judicial powers of the justices. The first of the statutes altering the pattern of local government was the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76, s. 102) (re-enacted 1882) which required the justices of boroughs to appoint a fit person to be their clerk, who was not to be an alderman, a councillor, or the clerk of the peace for the borough, and was prohibited from prosecuting persons committed for trial by his own justices. The last important one was the Local Government Act, 1888 (51 & 52 Vict. c. 41) which set up a standing joint committee of the county council (which the Act established) and quarter sessions, for dealing with matters relating to, *inter alia*, clerks of the peace and justices' clerks.

Between those dates there was a spate of legislation to expand the jurisdiction and codify the procedure of justices, which greatly increased the work of their clerks.

In 1847, for instance, the Juvenile Offenders Act (10 & 11 Vict. c. 82), the first of the statutes which have enabled justices to deal summarily with a widening range of indictable offences, made the clerk the person to whom all fines imposed under the Act were to be paid, and placed on him, for the first time, the duty of making out and delivering to witnesses orders on the county for the payment of their expenses.

The Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), which, with the Indictable Offences Act of the same year (c. 42) laid the solid foundation on which the magistrates' courts of today have been built, made the clerk accountable to his justices and to the County or Borough Treasurer for all penalties and fees received by him, and provided that his name should appear in warrants of distress as the person to whom money collected on them was to be paid. Later by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 99, s. 23) he was also given the duty of keeping the court register.

The clerk as adviser to the justices

All these new administrative and clerical tasks were, however, far less important than the advice the clerk was called upon to give to his justices in an ever-widening field of law, including, after the Matrimonial Causes Act, 1878, the law of husband and wife.

That famous character from Addison and Steele's "*Spectator*," Sir Roger de Coverley, coming upon a troop of gipsies during a country ride, was at first in some doubt whether he should not act against them "but not having his clerk with him, who is a necessary councillor upon these occasions, and fearing that his poultry would be the worse for it, he let the matter drop." The eighteenth-century law against "Egyptians" was a simple matter compared with the great variety of laws the Victorian justices of the peace had to administer and they could rarely act with safety in the absence of their "necessary councillor." The clerk's most important qualifications therefore were a wide and deep knowledge of the law and the ability to guide justices tactfully through its complexities.

The Justices' Clerks Act, 1877

The usefulness was declining of men like Mr. Jinks, the obsequious clerk of Mr. Nupkin, the Ipswich magistrate in *Pickwick Papers*, whose only qualification was "three years in a county attorney's office." The best of them had done good work for the Commission in the five hundred years of its existence but few were fitted to cope with the business of a modern bench of justices. In 1877 their day was ended by the Justices' Clerks Act (40 & 41 Vict. c. 43) which required all justices' clerks to be barristers of fourteen-years' standing, or solicitors, or to have served for seven years as clerk to a stipendiary or police magistrate or, exceptionally, as assistant for fourteen years to a justices' clerk. It also made compulsory payment of clerks by salary; it had been permissible since 1851.

Later developments and the 1949 Act

The Justices' Clerks Association was no doubt gratified by this improvement in the status of its members. It had come into existence in 1839 as the result of a letter in *The Justice of the Peace* (founded in 1837) from Messrs. Smith and Ffinch, clerks to the Greenwich justices, advocating its establishment because of " the many additions to the duties of the justices of the peace " and the fact " that the remuneration of the clerks is so manifestly overlooked." But that gratification must have been considerably lessened when the salaries paid to clerks under the Act proved to be so absurdly low—as late as 1937 in 345 divisions the net reward of the clerk after he had paid his office expenses was under £100—that other sources of income were essential. As most clerks were solicitors they continued in private practice or combined their duties with those of a Town Clerk or Clerk to the Tax Commissioners or some similar office. When a Departmental Committee on Magistrates' Clerks heard evidence in 1938, 732 clerks out of 822 were employed only part time. In modern conditions this was obviously undesirable and inefficient but the Second World War delayed the Committee's report and it was not until 1949 that the Justices of the Peace Act set up in every county magistrates' courts committees which had the duty of appointing clerks to the petty sessional divisions. This made it possible, by the appointment in the less populous areas of the same clerk to two or more divisions, to have almost everywhere whole-time clerks paid salaries commensurate with their responsibilities.

After six hundred years " Davy, servant to Mr. Justice Shallow " has become a leading public official, well paid and pensionable, learned in the law, and far too occupied with court business, alas, to wonder if the headland should be planted with wheat.

Books consulted include:

Statutes at Large,
Dowling and Ryland: *Magistrates' Cases.*
Webb: *English Local Government.*
Lambard: Eirenarcha, 1591.
Archbold: *Justice of the Peace*, 1840.
Burns: *Justice of the Peace*, 1869.
Putnam: *Proceedings before the Justices of the Peace in the 14th and 15th centuries*

The Probation Service and the Magistrates' Courts

(A Critical Review)

By Herschel A. Prins *

The manner in which a particular community deals with its offenders is often considered to be a good indication of its civilised status. The increasing desire of those in authority to treat as many offenders as possible in " open " conditions can best be seen in the slow development of the probation service in this country. Today, the probation service is generally regarded as an important means of attempting to understand and prevent delinquent conduct. Its development and present practice owe much to the sociological and psychological sciences, and it retains its fundamental belief in the intrinsic worth of the individual—a belief based on a vocational approach. The purpose of this paper is to give a critical account of the present-day probation service as it relates to the magistrates' courts, to draw attention to some of the problems involved, and to make one or two suggestions as to how some of these might be solved.

Historical background [1]

The Summary Jurisdiction Act, 1879, had enabled the lower courts to discharge an offender upon conviction, with or without security, to be of good behaviour and to come up for sentence when called upon. The Probation of First Offenders Act, 1887, extended the principles of release for *first* offenders. With the passing of the Probation of Offenders Act, 1907, we have the establishment of the first probation "system" in this country. It quickly became clear, however, that the Act "was not being worked successfully,"[2] and a committee was appointed in 1909 to inquire into the working of the system.[3] The committee found that probation orders had been made for one-ninth of all appearances for indictable offences, and that "there was enormous variety between different areas.[4] The Criminal Justice Act, 1914, gave additional power to the courts to include a condition of residence in probation orders, and the Criminal Justice Act, 1925, gave authority to the Secretary of State to regulate the salaries and conditions of probation officers. Every lower court was required to appoint a probation officer, and the organisation of the work of probation officers by a committee was made statutory. An important power was also given to the Home Office enabling the Home Secretary to combine petty sessional divisions for the more efficient administration of the service. Between the passing of the 1925 Act and the Criminal Justice Act, 1948, the most important development was the appointment in 1934 of a committee to inquire into the social work of the courts, and whose report was published in 1936.[5] Some of the most important recommendations of the 1936 committee were concerned with training and the committee commended a "Home Office experiment begun on modest lines in 1930."[6] The Criminal Justice Act, 1948, consolidated the law relating to probation and cleared up a number of administrative anomalies.

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* At present Tutor in Social Work, North-Western Polytechnic, London. Formerly a probation officer for some years. From 1957–59 Psychiatric Social Worker, Stamford House Remand Home and Approved School Classifying Centre. He has written a number of papers on delinquency and social work problems; he contributed a paper to this *Review's* special number on " Violence " in October 1960 ([1960] Crim.L.R. 657). Member, Executive Committee, Howard League for Penal Reform, and I.S.T.D. Education Committee. Assistant Editor, *British Journal of Psychiatric Social Work.*

[1] For a more detailed account of the history of the probation service see: *The Probation Service* (ed. J. F. S. King), Butterworth & Co., 1958 (Chaps. 1 and 10); *Probation and Related Measures*, United Nations, Department of Social Affairs, New York, 1951 (Chap. 8); F. Dawtry, " Whither Probation? " Brit. J. Delinq., Vol. VIII, No. 3, 1958; W. Elkin, *The English Penal System*, Pelican Books, 1957 (Chap. 3); Gordon Rose, *The Struggle for Penal Reform*, Stevens, 1961, pp. 81 *et seq.* and Chap. 11. For a useful and " non-technical " account, see also John St. John, *Probation—The Second Chance*, Vista Books, 1961.

The need for reassessment

It is now necessary to review very briefly some of the changes that have taken place in both the functions and the administration of the probation service, and to see these against the changing contemporary scene. It is apparent that at the present time "probation work, standing half-way between institutional treatment of offenders and ambulant treatment without formal supervision, branches out in many directions."[7] The basic work of the probation service has always been largely with offenders placed on probation, and its work in this field has increased steadily. This increase is not entirely of a numerical nature. In recent years, the problems referred to probation officers have become more and more complex, and, "probation, once used for the simple or youthful offence, is now regarded as a form of treatment for serious social problems where the work of well-trained case-workers is required."[8] The change of emphasis in the probation officer's work has also brought about a need for a greater degree of understanding of human behaviour by the officer, and for increased insight into his own reactions.[9] In addition to this change in the *depth* of work carried out, the probation officer of today has had to undertake an increasing *variety* of work. The Criminal Justice Act, 1948, and the Probation Rules have involved the probation officer in many and varied duties relating to the after-care of discharged prisoners, borstal boys and girls, children from approved schools, and (when the provisions of the Criminal Justice Act, 1961, are implemented) young men discharged from detention centres. In addition, the work of matrimonial conciliation looms large on the probation officer's horizon, and, after some diminution in adoption work, recent legislation has increased the probation officer's responsibilities in this field.[10]

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[2] See Rose, *op. cit.*, pp. 81 *et seq.* for a full account of these and subsequent developments.

[3] Report and Minutes of Evidence of the Departmental Committee on the Probation of Offenders Act, 1907 (1910), Cd. 5001–5002.

[4] Rose, *op. cit.*, p. 84.

[5] Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction (1936), Cmd. 5122.

[6] See F. J. Macrae, "The English Probation Training System," Brit. J. Delinq., Vol. VIII, No. 3, 1958, for a full account of these developments.

[7] Editorial, Brit. J. Delinq., Vol. VIII, No. 3, 1958 (special number on "Probation").

Present trends

The probation officer as diagnostic worker

Concerning his relationship with the court, the probation officer can perhaps be best regarded as its welfare officer, and, as far as offenders appearing before the court are concerned, as its diagnostic agent. This emphasis on diagnosis is most important, since correct diagnosis will not only best serve the interests of the offender, but also those of the community as a whole in terms of the prevention of possible recidivism. Whilst the court's facilities for remand for inquiries seem to be increasingly implemented, there are still instances when such inquiries are not made. Despite this however, the inquiries that are made appear to be quite numerous. The Home Office Probation Division Annual Statistics for England and Wales, 1959, give the following figures[11]:

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[8] Dawtry, *op. cit.*

[9] See George Newton, "Trends in Probation Training," Brit. J. Delinq., Vol. VI, No. 2, 1956, for an account of the probation officer's need for an adequate understanding of case-work practice.

[10] The probation officer's responsibilities in the field of matrimonial conciliation derive largely from the Summary Procedure (Domestic Proceedings) Act, 1937, and the Matrimonial Proceedings (Magistrates' Courts) Act, 1960. They also have certain responsibilities with regard to divorce proceedings under the Matrimonial Proceedings (Children) Act, 1958. The Adoption Act, 1958, has tended to increase the functions of the probation officer as guardian ad litem in adoption work.

TABLE 1—SOCIAL INQUIRIES

Juveniles	Adults
58,743	29,563[12]

There is an important point to be considered in connection with these figures. It will be seen (from note 12) that they do not distinguish between those inquiries made in a few minutes in the cells, and those made by a full social and *home* investigation. It is important for magistrates to realise and appreciate the importance of proper investigation so that their decisions may be backed by full and detailed knowledge of the defendant and his background.[13] It is to be hoped that magistrates will improve their practice in this respect as time goes by. Without fully going into the controversy concerning pre- or post-trial inquiries, it seems reasonable to suggest that where it is known that a plea of guilty is to be entered, pre-trial inquiries might be very helpful to the court, always provided that the accused agrees to such inquiries being made. This might be particularly helpful in some rural districts where courts sit infrequently. There is some precedent for this in the case of juvenile offenders, and the Streatfeild Committee have recommended the practice to the higher courts.[14] Magistrates' courts might also consider the possibility of forwarding (with the consent of the probation officer and the accused) any reports in cases where the defendant is committed to an institution so that the latter may have the fullest possible information available. It is only by such means that diagnosis and treatment may be related adequately.

Day-to-day work of the probation officer

The degree of attention that the probation officer will be able to give to each of his clients must vary with the nature of the problems involved. Some clients require more intensive help than others. Magistrates can be particularly helpful (or unhelpful) in this respect by collaborating with their probation officers in the choice of cases to be placed under supervision. Obviously, the final choice must rest with the judiciary, but one wonders if there are occasions when opportunities are missed for placing those offenders under supervision who manifestly need this help, and if there are also occasions when orders are made unnecessarily. It is here that the probation officer has an additional role as educator of public opinion, and more will be said about this subject later.

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[11] Annual Probation Statistics for England and Wales, 1959 (magistrates' courts only).

[12] These figures do *not* distinguish between *full* social inquiries and those based on a few minutes in the cells. Arrangements are being made for subsequent returns to make this distinction.

[13] For a more detailed discussion of these problems, see H. A. Prins, "Social Inquiries and the Adult Courts," Brit. J. Delinq., Vol. VIII, No. 3, 1958.

[14] Report of the Interdepartmental Committee on the Business of the Criminal Courts, H.M.S.O., Feb. 1961, Cmnd. 1289, paras. 355–359.

Case-loads

It is very important that magistrates through their case committees and area probation committees should keep themselves informed of individual case-loads so that the work may be adjusted as required. The question of the appropriate size of individual officers' case-loads is a very complex one. Current figures show the present position to be as follows[15]:

TABLE 2 (A)—AVERAGE CASE-LOADS

	Probation	Supervision	After-Care	Money-Payment	Total
Men Officers	52·0	1·0	9·0	2·9	64·9
Women Officers	28·1	9·2	1·9	·7	39·9

The way in which these case-loads were made up can be seen from the following table:

TABLE 2 (B)—PROBATION OFFICERS' CASE-LOADS AS AT 31.12.59

Probation Orders	Supervision Orders	Money Payment Orders	After-Care
61,335	5,385	3,081	9,371 *

* Includes *all* after-care cases.

These figures require careful interpretation in the light of geographical location. A rural officer will spend more time travelling round his area, but an officer working in an urban district may have a greater number of " occasional " callers at his office. Some officers appear to work more effectively with a larger case-load, others seem to function more adequately with fewer cases. In addition, it is wise for magistrates to take into account the comparative ages of their officers, any health problems, and to remember also that any social worker may go through an occasional emotional " bad patch." Whatever one says about case-loads, however, it seems unlikely that probation officers can give of their best with case-loads of 60 or over.[16]

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[15] Probation Statistics, 1959.

Further details of the volume of work facing the service can be gathered from the following tables [17]:

TABLE 3 [18]

TOTAL NUMBER OF PROBATION ORDERS IN FORCE ON 31.12.59

Males	Females	Total
51,662	9,673	61,335 *

* The figures relating to Juvenile Courts and Magistrates' Courts only are:

40,359	8,774	49,133

Of the 36,352 probation orders *terminated* in 1959, 17,948 were orders in respect of male offenders, 3,997 in respect of females. 3,276 males and 528 females had their orders terminated early because of good progress. 6,970 males and 732 females were sent to a remand home, approved school, detention centre, made the subject of a fit person order, sent to prison, otherwise dealt with or lost track of.

TABLE 4—OTHER WORK CARRIED OUT

Matrimonial Work	76,214 *	Means Inquiries	2,989
Adoption Work	4,252	Advice *re* Difficult Children	10,483
Consent to Marry	1,627	Affiliation and Unmarried Mothers	3,861
Escorts and Financial Assistance	11,856	Pre-Release Contacts for persons in Approved School, Borstal, Prison, etc.	10,123
Voluntary Supervision	5,854		
Other Cases	32,264 [19]		

* Includes all matrimonial cases. In the annual statistics they are classified in more detail.

TABLE 5—STRENGTH OF SERVICE AS AT 31.12.59 [20]

P.P.O.'s	Dep. & Asst. P.P.O.'s	S.P.O.'s	P.O.'s (full-time)	P.O.'s (Tpy. and P/T.)
60	17	127	1,298	74

The most important conclusion to be drawn from the tables above is the wide variety of work undertaken by probation officers apart from "probation work" proper. It seems to be most important that magistrates should make due allowance for this when considering case-loads, staffing and the general efficiency of the service.

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[16] It is interesting to see that Cecil Leeson writing in 1914 ("*The Probation System*") felt that case-loads should never exceed 60 even with voluntary help. Quoted by Rose, *op. cit.*

[17] Probation Statistics, 1959.

[18] *Ibid.*

[19] Not already classified in above table.

[20] P.P.O.—Principal Probation Officer: S.P.O.—Senior Probation Officer: Tpy.—Temporary: P/T Part-time.

Direct relationships with magistrates, committees, etc.

Unlike some social case-workers, the position of the probation officer *vis-à-vis* his employer is a complicated one. Although employed by a local authority committee (consisting in the main of various justices representing the court or courts he serves), his day to day responsibility is to a variety of people. These may be the magistrates at the court he serves, his Senior or Principal Officer, his Case Committee, and finally, the Home Office who have an over-all central government function of inspection in order to maintain national standards. Moreover, the nature of probation work involves many factors related to authority, so that it is not altogether surprising that there are occasionally complications and problems of divided loyalties for the officer to face.

Area probation committees

It is regrettable that in some areas County Probation Committees do not seem to meet very frequently.[21] As a consequence of this, they are sometimes out of touch with their officers and their problems. In some areas, however, the liaison between the County Committee and their probation staff is good; much will depend on the personality of the Principal Probation Officer in this respect. It may also be true that County Probation Committees do not co-opt as many outside members as they might. Such co-option of persons with special interests and qualifications could be of particular value in improving the Committee's support to the service as a whole.

Case committees

If one bears in mind the developments (referred to earlier in this paper) in the type of case-work that is now required of a probation officer, and compares this with the less complicated methods of " persuasion, exhortation and support " [22] of the early missionaries, it is necessary to ask oneself whether the time is not now ripe for some modification in the role of Case Committees. Is it really desirable or appropriate for the magistrates to keep up a pretence of advising the probation officer on complex matters concerning personal relationships? Should not their function be to give general support through their interest in the work, and occasionally to provide the officer with local contacts? It is in this connection that the probation officer can perhaps play the educative role already referred to, in an endeavour to keep his magistrates in touch with current trends in social work and penal practice. Might not Case Committee meetings be used as opportunities for discussion groups on some specific aspect of probation work, rather than a formal and often quite meaningless recital of the progress of Tommy Snooks, whose case has already probably been forgotten by the magistrates who placed him under supervision? The practice and procedure of case committees varies very widely. Some committees require written reports to be prepared in advance of the meetings (a tremendous burden for many already overworked staffs). Others anticipate a short formal report about every case—irrespective of whether the probationer is doing well or not. It has been known for some case committees to have access to the case-papers, and in one area known to the present writer the magistrates read the files *at home*. This is a practice that should be forbidden absolutely. It cuts right across the professional relationship that the probation officer is attempting to establish with his client. Moreover, a number of files may contain reports from other social workers who would not wish under any circumstances for their information to be made available to anyone but the probation officer concerned in the case. The practice of providing written reports to case committees has a number of dangers. Files containing such papers can easily be left on buses or other vehicles, and, even if they are got home safely, there is always the possibility that they may be seen by the wrong people. There is a further problem arising out of the relationship between the probation officer and the case committee that requires comment. This concerns the practice of the officer having to consult the case committee before bringing an offender back before the court for breach of requirement of his order.[23] There appears to be no legal requirement for such a practice, and it seems inadvisable, since the case may eventually be heard by the same magistrates who were informed about the case in committee.

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[21] Regarding the duties and powers of Probation and Case Committees: see Criminal Justice Act, 1948, Sched. V, ss. 2 and 3.

[22] G. Newton, *op. cit.*

It is not within the scope of this paper to comment at length on training, but it may be appropriate to make one or two suggestions at this stage so far as they concern relationships with magistrates. As at present organised, the Home Office Probation Training Course is based on London, where trainees attend a theoretical course lasting approximately three months. This course is usually sandwiched between two periods of practical work in the field under a tutor officer. The present system has the disadvantage of tending to divorce theory from practice, and modern developments in casework teaching show that theory and practice are best learned alongside.[24] If the Home Office training course was to be regionalised, and training attached to a University Department, it might be possible to relate theory to practice more evenly, since trainees could do field work on certain days of the week and on the other days could learn the theoretical aspects. Such regionalisation would also have the advantage that there would not only be highly qualified staff on the spot to do the teaching, but, in addition, it should be possible to stimulate *local* interest, and thus bring magistrates into the training situation much more frequently than occurs at the present time; they would feel that they were to some extent participating in the training programme.

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[23] See Criminal Justice Act, 1948, s. 6 (1).

In addition to the need to be able to work well with magistrates, a probation officer must be able to liaise with many other officials—those closely connected with the court, and those outside it. Perhaps the most important relationship is that between the probation officer and the clerk to the magistrates, since the clerk will often act as the interpreter of the probation officer's role and function to the magistrates. It is only if this relationship is harmonious, with both clerk and probation officer fully appreciating each other's position that the work will run smoothly.

The future

There are a number of questions that require careful consideration concerning the future of the probation service. It seems that probation officers will be required to undertake increasing responsibility for after-care. Whether this will lead to a degree of specialisation within the service is problematic; if it does lead to specialisation it could of course have important repercussions on the probation officer's functions in relation to magistrates' courts.

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[24] As, for example, in the " generic " social work courses provided in some University Departments. There are currently *three* main methods of entry into the probation service. Candidates *under* 30 may take a social science course followed by one of the " generic " courses or the Home Office special training course. Candidates *over* 30 who are especially suitable may not have to undergo the academic course, but take a specially designed Home Office course. Finally, local committees may still appoint *direct entrants*, who may in fact be totally unsuitable. It is very much to be hoped that the practice of appointing direct entrants will cease at the earliest opportunity, unless (as in London) very good arrangements can be made for " in-service " training.

In addition, the Streatfeild Committee [25] have implied that the probation officer is to be regarded as a professional expert on sentencing, and lower courts will need to take a lead from this. This may not be entirely acceptable to some courts, and the probation service may need to "work through" what may be initially a period of some difficulty. With the increase in responsibility for after-care and other types of work, the service may need to consider how far it can carry effectively the same number of supervision (care or protection, truancy, etc.) cases as before. Might not some of this work be dealt with by local authority children's department, thus leaving the probation officer more free to deal with delinquency problems? Probation officers are still asked to supervise a large number of Money Payment Orders made in magistrates' courts. One sometimes wonders to what extent the court considers them an alternative to probation and therefore misuses this particular penal method. If one accepts the probation officer's role as primarily that of case-worker, there can be very little justification for continuing to cast him in the role of money collector for the clerk's office.

Acknowledgment

Grateful acknowledgment is made to the Probation Division of the Home Office for making available the Probation Statistics for 1959 and for permission to publish abstracts from these.

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[25] *Op cit.*

Practice and Procedure

Licensing Act, 1961

Section 12 and Schedule 4 of the Act, which come into force on November 1, 1961 (see below, page 728), abolish the confirming procedure and substitute appeal to quarter sessions by all parties.

Appeal to quarter sessions will lie against any decision of licensing justices granting or refusing to grant a new licence, or an ordinary removal of a licence, and against any decision of licensing justices as to the conditions of an on-licence.

The procedural provisions for licensing sessions and appeals are contained in Part I of Schedule 4. Under paragraph 3 (2) the provisions of the Magistrates' Courts Act, 1952, which relate to compelling the attendance of witnesses, etc. (s. 77 (1) (3) and (4)) will apply in relation to licensing justices, and to applications for the grant of a justices' licence as if they were a magistrates' court for the petty sessions area constituting the licensing district and the application were a complaint.

Applications for licences may be made at not less than five licensing sessions spread over the year (s. 12 and para. 1 of Part I of Schedule 4).

Part III of the Act relating to clubs comes into operation on March 1, 1962 (see below, page 728).

Section 29 and Schedule 6 provide for the maintenance of a register of registered clubs by the clerk to the justices. The register is to show the permitted hours fixed under the club rules (as notified to the clerk), and is to be in such form as may be prescribed by regulations of the Home Secretary. Section 29 (3) provides for inspection of the register by, *inter alias*, police officers and officers of the local authority.

Section 30 governs appeal to quarter sessions by a club against a decision of a magistrates' court relating to a registration certificate.

Case and Comment *

EVIDENCE

Cautioning accused—giving of a caution a rule of practice

R. v. Allsopp

Court of Criminal Appeal: Lord Parker C.J., Streatfeild and Ashworth JJ.: December 15, 1960: 111 Law Journal 124.

The court, refusing A.'s application for leave to appeal, referred to evidence given at the trial by police officers as to statements made by A. when he had not been cautioned, and pointed out that it was only a rule of practice that a caution should be given. [H. P.]

Imputation on character of Crown witness—necessary to defence—liability of accused to cross-examination—Criminal Evidence Act, 1898, s. 1 (f) (ii)

H.M. Advocate v. Deighan

Sheriff Court, Edinburgh: Sheriff-Principal Ross McLean, Q.C. and jury: 1961 S.L.T.(Sh.Ct.) 38.[1]

D., who was charged on indictment with breaking into G.'s house, assaulting G. to his severe injury and robbing him, gave evidence on his own behalf at his trial in support of a special defence of self-defence, which included evidence that G., the chief Crown witness, had been living on the immoral earnings of prostitutes and had previous convictions for violence.

Held, on the Crown's application for leave to cross-examine the accused as to character, that in the particular circumstances the attack on G. was necessary to the nature of the defence, and the court's discretion exercised by refusing to allow the Crown to take advantage of section 1 (*f*) (ii) of the Act.

Commentary. Section 1 (*f*) of the 1898 Act enacts: " A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or is of bad character unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or witnesses for the prosecution." The defence in the present case was an endeavour to negative the breaking in by showing that the house was a resort of prostitutes, that the accused went there in company with a prostitute who had a key, and that in the fracas that followed the accused had to defend himself because of the violence of the witness. The court in its discretion held that this imputation on the witness as a habitually violent and immoral person was a necessary consequence of the defence and not such an attack as would put the accused's character in issue. There is but one reported Scots case of such leave being granted: *O'Hara* v. *H.M. Advocate*, 1948 J.C. 90.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: Walter Sutherland, Solicitor, Edinburgh. For the Crown: The Procurator Fiscal, Edinburgh.

In England *R.* v. *Marshall* (1899) 63 J.P. 36, ruled that where a man accused of murder impeached the victim's husband, a Crown witness, he forfeited protection. More favourable to the accused were the cases of *R.* v. *Bridgewater* [1905] 1 K.B. 131 (suggestions by accused of his employment as police informer), *R.* v. *Preston* [1909] 1 K.B. 568 (criticism of identification parade), and *R.* v. *Westfall*, 7 Cr.App.R. 176 (allegations of undue violence at arrest). In *R.* v. *Hudson* [1912] 2 K.B. 464, a court of five judges approved a natural and logical interpretation of the subsection as to imputations with the consequence that an accused whose record will not bear scrutiny is more limited in the scope of his defence than a first offender. Cases of rape are treated as *sui generis* since the defence of consent is a mere denial that the prosecution have established its absence: *R.* v. *Turner* [1944] K.B. 463, cited without disapproval in *Stirland* v. *D.P.P.* [1944] A.C. 315. But to assert in reply to a charge of sexual relations with a step-daughter that she learned the habit at school is to admit character cross-examination: *R.* v. *Morris*, 43 Cr.App.R. 206. In *R.* v. *Jenkins*, 31 Cr.App.R. 1, a case of receiving a fur coat in which the accused cross-examined the woman from whom he was alleged to have stolen the coat upon her immoral relations with him admitting character cross-examination, it was established that the court's discretion to admit or refuse leave is to be exercised to the end of securing a fair trial. And to allege that a witness fabricated evidence: *R.* v. *Jones*, 17 Cr.App.R. 117—or that a statement was concocted by the police—*R.* v. *Clark* [1955] Crim.L.R. 567—or obtained by threats—*R.* v. *Cook* [1959] Crim.L.R. 358—have all been visited upon the accused with like consequences.

The present case marks the Scottish courts' more liberal approach to this problem [2] towards which the English courts may be moving despite the influence of *Hudson's* case. For the view that hardly any rule of the law of evidence stands more in need of change, see Glanville Williams, *The Proof of Guilt*: 2nd ed., 186.

[Report and Commentary by ALISTAIR R. BROWNLIE, S.S.C.]

Indecent assault—evidence of complainant

See R. *v.* REES, below, page 714.

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[2] Contrast the recent case of *R.* v. *Brown* [1960] Crim.L.R. 556.

Putting character in issue—Crown suggestion that accused previously implicated in crime—Summary Jurisdiction (Scotland) Act, 1954, s. 31 (1) (b)

Deighan v. Macleod

High Court of Justiciary: Lord Justice-Clerk (Thomson), Lords Patrick and Mackintosh: 1960 S.L.T. 2.[3]

D. was tried on a summary complaint of theft. At the trial a police witness for the prosecution gave evidence that he recognised D. as a known thief though no question likely to elicit such an answer had been put to him, and D. was convicted.

Held, dismissing D.'s appeal against conviction that where a witness voluntarily emitted evidence which it would have been wrong for the prosecutor to have elicited, the conviction would stand.

Commentary. Section 31 (1) (*b*) of the Summary Jurisdiction (Scotland) Act, 1954, extends to the accused a like protection against previous convictions being disclosed to the judge in summary cases as the Criminal Procedure (Scotland) Act, 1887, s. 67, affords against disclosure to the jury in solemn procedure. See *Fielding* v. *H.M. Advocate*, below, p. 712. The unreported case of *Wallace* v. *H.M. Advocate*, February 14, 1957, decided that where a prosecution witness unwittingly mentioned the accused's previous conviction the conviction could stand: followed *Kepple* v. *H.M. Advocate*, 1936 J.C. 76. The present case emphasises that the 1954 Act lays an injunction on the prosecutor to avoid reference to previous convictions. So, direct evidence of previous convictions resulted in quashing in *McLean* v. *Skinner*, 1907 S.C.(J.) 96, and even where the fact could only have been inferred from the notice of penalties a similar result was reached in *Bryce* v. *Gardiner*, 1951 J.C. 134. The English court has a duty to exclude prejudicial evidence: *R.* v. *Miller* [1952] 2 All E.R. 667; 36 Cr.App.R. 169, failure resulting in quashing: *R.* v. *Cohen* [1938] 3 All E.R. 380; *R.* v. *Hudson* [1912] 2 K.B. 464.

What others disclose without malice will not ground reversal of conviction, but there must surely be limits to what can be tolerated even where the prosecutor is not at fault. The criterion of fair trial would seem in Scotland to apply though its limits have not yet been explored: *Haslam* v. *H.M. Advocate*, 1936 J.C. 82.

See [1954] Crim.L.R. 871.

[Report and commentary by ALISTAIR R. BROWNLIE, S.S.C.]

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[3] For the appellant: *S. E. Bell* (instructed by W. F. Wisley, Solicitor, Edinburgh). For the respondent: *Lord Advocate* (*Milligan, Q.C.*), *Brand, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

Putting character in issue—defence suggestion that Crown witness implicated in crime—Criminal Procedure (Scotland) Act, 1887, s. 67

Fielding v. H.M. Advocate

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Russell: 1960 S.L.T. 105.[4]

F. was indicted for extorting money from X by threats. X gave evidence that he had been assaulted and robbed some months before and on the occasions libelled was threatened with similar treatment. F.'s solicitor suggested to X in cross-examination that on the previous occasion X had been engaged in a criminal operation. The prosecutor was allowed to cross-examine F. as to previous convictions, and he was convicted.

Held, dismissing F.'s appeal against conviction that since allegations of X's criminal activity were not necessary to establish his defence they put F.'s character in issue and admitted cross-examination as to character.

Commentary. The Criminal Evidence Act, 1898, s. 1 (*f*) (ii), provides that an accused whether in Scotland or England shall not be required to answer any question tending to show that he has committed a crime or is of bad character. An exception to this rule is allowed where the attack is necessary and integral to the defence, but where an attack exceeds these limits it loses privilege: *O'Hara* v. *H.M. Advocate*, 1948 J.C. 90. In Scotland it is permissible to prove the accused's passionate and violent temper in charges of homicide in *chaude melle* and in certain crimes previous convictions were habitually libelled, but section 67 of the Criminal Procedure (Scotland) Act, 1887, prohibits laying previous convictions before the jury prior to verdict save where the accused has set up evidence of good character. By the Criminal Justice (Scotland) Act, 1949, ss. 39 (1) (*a*) and 46 (2), previous convictions are no longer libelled but *cf. R.* v. *Flower* (1956) 40 Cr.App.R. 189 and *Clark* v. *Connell*, 1952 J.C. 119. Where an extract conviction admissible to prove the accused an habitual criminal was laid before the jury containing reference to a previous conviction the irregularity was held in the circumstances not to vitiate conviction: *Raeburn* v. *H.M. Advocate*, 1937 J.C. 100. But in *Corcoran* v. *H.M. Advocate*, 1932 J.C. 42, the fact that Crown witnesses disclosed that the accused before arrest had been identified from a police album of photographs was held not tantamount to disclosure of previous conviction, though the court observed *obiter* that a true breach of section 67 must result in quashing. In *Palmer* (1914) 10 Cr.App.R. 77 and *Kingsland* (1919) 14 Cr.App.R. 8 the English court reached a similar decision to that in *Corcoran* while in *Varley* (1914) 10 Cr.App.R. 125, *Wainwright*

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[4] For the appellant: *Morison* (instructed by Richard Pollock, S.S.C., Edinburgh). For the respondent: *Wylie, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

(1925) 19 Cr.App.R. 52, *Haslam* (1925) 19 Cr.App.R. 59 and *R.* v. *Dwyer* [1925] 2 K.B. 799 the convictions were quashed. So where the prosecution led evidence of crime beyond the scope of the charges the jury should have been discharged: *R.* v. *Firth* [1938] 3 All E.R. 783, and the conviction was quashed in *Cameron* v. *Waugh,* 1937 J.C. 5. Where the fact of previous conviction was spontaneously given by a witness in *Kepple* v. *H.M. Advocate,* 1936 J.C. 76 there was no breach of section 67 whose purpose was said by Lord Justice-Clerk Aitchison in *Haslam* v. *H.M. Advocate,* 1936 J.C. 82 to be "to ensure that an accused person shall be fairly tried." See *Deighan* v. *Macleod, supra,* p. 711.

The present case distinguished suggestions that the Crown witnesses may be mistaken from the downright imputation of criminal conduct which constitutes an attack sufficient to operate release of the privilege. The English rule is similar, see *R.* v. *Butterwasser* [1947] 2 All E.R. 415; *R.* v. *Morris,* 43 Cr.App.R. 206; [1959] Crim.L.R. 778; *R.* v. *Cook* [1959] 2 Q.B. 340; [1959] Crim.L.R. 358 and *Stirland* v. *D. P. P.* [1944] A.C. 315. Where there may have been accidental disclosure each case is treated separately: *R.* v. *Thomas* [1957] 1 W.L.R. 1091; [1957] Crim. L.R. 822.

For criticism of the present law see Glanville Williams, *The Proof of Guilt,* 2nd ed., 186.

[Report and commentary by ALISTAIR R. BROWNLIE, S.S.C.]

Search of accused's dwelling in Eire—admissibility of documents recovered though not comprehended in search warrant

H.M. Advocate v. McKay

High Court of Justiciary, Glasgow: Lord Wheatley: 1961 S.L.T. 174.[5]

At M.'s trial on indictment for bank robbery and stealing £38,000 defence counsel objected to the admissibility of documents recovered by a search of M.'s dwelling in Eire in pursuance of a Scottish search warrant endorsed by a Dublin magistrate and a similar Irish warrant which specified cash of £35,000 stolen or unlawfully obtained.

Held, repelling the objection, that though the procedure was in accord with Irish practice there was an irregularity of Scots practice of which the court must take account, but which could be excused having regard to the facts and circumstances of the case.

Commentary. A search warrant should specify what is sought to be recovered and not be an open warrant used to fish for evidence: *Bell* v. *Black and Another* (1865) 5 Irv. 57. The Scottish warrant specified stolen money but the police took possession of documents relating to the whereabouts of money. In *Lawrie* v. *Muir,* 1950 J.C. 19, Lord Justice-Clerk Cooper made it clear that irregularities may have to be excused and the main consideration is whether the discretionary principle of fairness to the accused has been infringed. In English law the test is whether the evidence is relevant: if so the court is not concerned with the method by which it is obtained: *Kuruma* v. *R.* [1955] A.C. 197; [1955] Crim.L.R. 184. One of the factors which Scottish courts have looked to is the urgency of the search: *H.M. Advocate* v. *McGuigan,* 1936 J.C. 16.

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[5] For the Crown: *Law, A.-D., Robertson* (instructed by Lionel I. Gordon, Crown Agent). For the panel: *Leslie, Q.C., Irvine Smith* (instructed by Lawrence Dowdall, Solicitor, Glasgow).

See the article by Glanville Williams at [1955] Crim.L.R. 339.

[Report and Commentary by ALISTAIR R. BROWNLIE, S.S.C.]

INDECENT ASSAULT

Evidence of complainant—inconsistent with previous statements

R. v. Rees

Courts-Martial Appeal Court: Lord Parker C.J., Streatfeild and Ashworth JJ.: December 15, 1960: 111 Law Journal 124.

The court allowed R.'s appeal against conviction for indecent assault on a girl on the ground that the verdict was unreasonable. Lord Parker C.J., giving judgment, pointed out that the girl's evidence had been tainted by a proved lie, and that the terms of a complaint which she had made to her mother were quite different from her evidence. [H. P.]

MISPRISION OF FELONY

Whether offence exists at common law—necessity for active concealment of felony—defences to offence

Sykes v. Director of Public Prosecutions

House of Lords: Lords Denning, Goddard, Morton of Henryton, Morris of Borth-y-Gest and Guest: June 23, 1961: [1961] 3 W.L.R. 371.[6]

S. was convicted at a Crown Court of misprision of felony in that, knowing that others had received stolen firearms, he unlawfully concealed the commission of the offence. He was sentenced to five years' imprisonment. The Court of Criminal Appeal dismissed his appeal ([1961] Crim.L.R. 483) holding that the offence of misprision of felony existed at common law and that an act of positive concealment was not necessary to constitute the offence. The court, however, reduced the sentence to one which would enable S. to be released forthwith (he having been in custody for over ten months). On appeal to the House of Lords:

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[6] For the appellant: *Edward Clarke, Q.C., J. Hugill* (instructed by Messrs. Church, Adams, Tatham & Co.). For the respondent: *Sir Jocelyn Simon, Q.C., S.-G., W. D. T. Hodgson, Q.C.* (instructed by the Director of Public Prosecutions).

Held, dismissing the appeal, that the offence of misprision of felony, meaning that a man knew that a felony had been committed and neglected to disclose it, had been an offence for several hundred years under the common law; and it was still an offence today. However, it was subject to just limitations. Non-disclosure might be due to a claim of right made in good faith. For instance, if a lawyer was told by his client that he had committed a felony, it would be no misprision in the lawyer not to report it to the police, for he might in good faith claim that he was under a duty to keep it confidential. Likewise with a doctor and patient, and a clergyman and parishioner. If an employer discovered that his servant had been stealing from the till, he might well be justified in giving him another chance rather than reporting him to the police; and so with the master of a college and a student. But close family or personal ties would not suffice where the offence was of so serious a character that it ought to be reported.

Per Lord Goddard: The offence should be sparingly prosecuted.

[H. P.]

Commentary. The prosecution relied on the statement of the law in Staundford's *Plees del Corone* (1557) and the subsequent similar statements by Coke, Dalton, Hale, Blackstone and others. The defence argued that Staundford had made an error which all subsequent writers had followed. The answer accepted by Lord Denning was that there were precedents in the " hue and cry " cases before Staundford wrote and that there is evidence of the recognition of the continuance of the offence down to the present day. Thompson B. invited a grand jury to find a true bill for misprision in 1813; in 1826 Chitty, in the second edition of his *Criminal Law* (p. 232), quoted a precedent for it, said to have been settled by ' a very able crown lawyer ": and in 1852 Parke B., addressing a grand jury, remarked that " The law with regard to this matter had certainly fallen into desuetude, but it was very necessary that it should be known it still existed." There have been several prosecutions since 1938. It is not surprising, in view of the weight of the authorities quoted, that the House unanimously decided that misprision was an offence known to the law and that it is not obsolete.

Moreover, since there is no such limitation stated in the authorities, it is not unexpected that the House should have held that active concealment is not an essential ingredient of the offence. Lord Denning pointed out that it is the absence of the requirement of any activity on the part of the accused which distinguishes the crime from (i) being an accessory before the fact; (ii) compounding a felony; (iii) interfering with the course of justice; and (iv) obstructing the police. (It should be noted that there are other distinctions.) It follows from the holding that misprision and compounding are separate offences that no element of benefit to the accused is necessary in the former and that the often cited observation of Lord Westbury in *Williams* v. *Bailey* (1866) L.R. 1 H.L. at 220 is wrong.

The nature of the offence is clarified in a number of other respects. It must be proved that the accused omitted to make disclosure within a reasonable time and that he has had a reasonable opportunity for doing so. The information must also be "so definite that it ought to be disclosed. A man is neither bound nor would he be wise to disclose rumours or mere gossip . . ."—*per* Lord Goddard. "It is not sufficient to tell the police that a felony has been committed. He must tell the name of the man who did it if he knows it: the place, and so forth. All the material facts known to him: see *R.* v. *Crimmins* [1959] V.L.R. 270"—*per* Lord Denning.

In other respects the nature of the offence, unhappily, is less clear. Lord Denning accepted, in effect, the same limitation as that imposed by Slade J. in *R.* v. *Wilde* [1960] Crim.L.R. 116. Lord Denning said: ". . . misprision comprehends an offence which is of so serious a character that an ordinary law-abiding citizen would realise he ought to report it to the police." But Lord Morton said that he thought Slade J. "erred in importing that limitation into the offence of misprision of felony; but his words may well be regarded as a valuable indication of the type of case in which a prosecution for that offence is appropriate." The other judges did not advert to the question. It is thus not clear that the case put of failure to report boys stealing windfall apples is not technically an offence. If the limitation is accepted, it leaves the boundaries of the offence very vague. Indeed, ought not the ordinary law-abiding citizen to report the fact that his neighbour's apples are being stolen? Whether he should himself be liable to a criminal punishment for failure so to do seems to be an entirely different question.

The other "just limitations" (above, but referred to only in the speech of Lord Denning) also give rise to difficulties. The use of the term "claim of right made in good faith," with great respect, is curious. This usually signifies belief that conduct is lawful otherwise than through ignorance of the criminal law. See Glanville Williams, *The Criminal Law*, 2nd ed., § 115. In the light of the example of the lawyer (who has presumably read the report of the instant case) this can hardly be the meaning intended here. It would appear Lord Denning means that a variety of privilege operates in this area and that there would be no *actus reus*. The lawyer would have an actual right to remain silent. This particular case is supported by the professional privilege in the law of evidence. (If misprision extends to a case of a contemplated felony (see below), does the lawyer's privilege extend so far or is it—again by analogy to the law of evidence: *R.* v. *Cox and Railton* (1884) 14 Q.B.D. 153—excluded in such a case?) The other cases are less easy to justify. Why, for example, should the master of a college have a privilege if a parent does not? The master's special relationship to the student only arises because he is *in loco parentis*. Yet, ". . . . if it is said [the offence] obliges a father to inform against his son, or vice versa, I would answer that, in the case of a really heinous crime, be it so."—*per* Lord Goddard.

A further uncertainty is whether a man is bound to disclose a contemplated felony which comes to his knowledge, a point expressly reserved by the court. Lambard, Dalton and Hawkins say that misprision extends to this case and it may be thought that reasons of policy are more strongly in favour of the offence covering this situation than the ordinary case of a completed felony.

It has previously been pointed out in these commentaries ([1960] Crim.L.R. 119–120; [1961] Crim.L.R. 485) that many respectable persons and institutions—banks, schools, universities, trade unions, etc., regularly fail to report undoubtedly serious felonies for reasons which seem to them, and may be thought to be, perfectly good. It is by no means clear that they are not now guilty of an offence, and it is submitted that it is unfortunate that the law be out of step with the practice of generally law-abiding members of the community through the resurrection of misprision when, for all practical purposes, we have got on perfectly well without that crime for a hundred or more years at least. Lord Goddard points out that "The law is nowadays administered with dignity and common sense"; but as previously observed, the law-abiding citizen should not have to depend on the benevolent exercise of a discretion for his freedom from prosecution and conviction.

Finally, the case again emphasises the anomalies which arise from the distinction between felonies and misdemeanours. The ordinary law-abiding citizen may well think that it is his duty to report a case of fraudulent conversion of £100,000; but—whatever may be the answer to the case of the boy and the windfalls—his legal duty does not extend so far.

MURDER

Effect of alcohol on mens rea of accused—whether it produced insanity within the M'Naughten rules—time at which M'Naughten rules should be applied

Attorney-General for Northern Ireland v. Gallagher

House of Lords: Lords Reid, Goddard, Tucker, Denning and Morris Borth-y-Gest: [1961] 3 W.L.R. 619; *The Times*, July 21, 1961.[7]

G. was convicted of the murder of his wife. At the trial, the facts proved were that G. had a grievance against his wife and had made up his mind to kill her. To this end he bought a knife and a bottle of whisky (for consumption by himself either before or after the killing). He in fact carried out his intention. He killed his wife with the knife and consumed much of the whisky. The defence was insanity or, alternatively that he was so drunk when he killed her as to be incapable of forming the necessary intent. The Court of Criminal Appeal in Northern Ireland allowed G.'s appeal on the ground that the trial judge had misdirected the jury, in particular as to the moment of time at which the M'Naughten test should be applied. That court directed a verdict of acquittal to be entered The court also certified that the following point of law of general public importance was involved in their decision: " Whether a person in a psychopathic condition which is quiescent may become insane within the meaning of the rules in M'Naughten's case, 10 Cl. & F. 200, as the result of the voluntary consumption by him of intoxicating liquor, if the effect of that intoxicating liquor is to bring about an explosive outburst in the course of a mental disease although the disease was not itself caused by intoxicating liquor."

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[7] For the appellant: *W. Brian Maginess, A.-G.* (N. Ireland), *C. A. Nicholson, Q.C., H. Bowman* (instructed by Messrs. Linklaters & Paines for Mr. Richard F. Sheldon, Belfast). For the respondent: *B. Kelly, Q.C., R. Furguson* (instructed by J. Tickle & Co. for Mr. David Gordon, Belfast).

Held, allowing the appeal, that a verdict of acquittal was the one verdict which no reasonable jury could have returned. The fact that this was the verdict which the Court of Criminal Appeal had directed to be entered served to expose the absurdity of the restrictions imposed on that court (both in England and Northern Ireland) which did not permit an order for a re-trial nor, in a case such as the present, give it any discretionary powers with regard to verdict or sentence. The real conflict of medical evidence here was a conflict as to the nature of the disease of the mind from which G. was suffering. It was said that he was an aggressive psychopath liable to outbursts of violence on provocation or under the influence of alcohol or any other exciting cause. The issue was whether these outbursts of violence merely produced lack of self-control or whether they prevented him having any knowledge of the nature and quality of his act or that it was wrong. Accordingly, the trial judge had been right to direct the jury to consider G.'s condition prior to his consumption of alcohol. A man could, of course, produce in himself a disease of the mind by excessive consumption of alcohol, *e.g., delirium tremens*, in which case the question would arise as to whether his condition came within the M'Naughten Rules. However, in the present case G. was said to have been an aggressive psychopath before he consumed alcohol which resulted in an outburst of violence and produced, according to the prosecution evidence, nothing more than a lack of self-control. Parts of the summing-up were open to criticism but, reading it as a whole, the issue had been made abundantly clear to the jury. Even if this were not so, the proviso to section 3 (1) of the Criminal Appeal (Northern Ireland) Act, 1930, should be applied on the ground that there had been no miscarriage of justice. [*N.B.*—The defence of diminished responsibility is not available in Northern Ireland.]

[H. P.]

Commentary. Under the Administration of Justice Act, 1960, an appeal lies to the House of Lords from a Divisional Court or the Court of Criminal Appeal in a criminal cause or matter only with leave; and leave is not to be granted unless the court below certifies that a point of law of general public importance is involved; and it appears, either to the court below or the House, that the point is one which ought to be considered by the House. It was argued by counsel for G. that the House had no jurisdiction to decide any question beyond that set out in the certificate; and that, no matter how the House answered the question in the certificate in this case, the verdict of acquittal could not be affected. It was held, however, that the section does not limit the House to the question certified and consequential matters. It was open to the House, therefore, to consider the points raised in the present appeal; but they were related to the matter certified and it was not necessary to decide whether it was open to an appellant to raise matters wholly unrelated.

The Court of Criminal Appeal in Northern Ireland reversed the conviction on the ground that the judge had misdirected the jury in telling them to apply the M'Naughten Rules to the accused's state of mind at the time before he took the alcohol and not at the time of committing the act. Lord Tucker, with whom Lords Reid and Goddard agreed, seems to have accepted that such a direction would be (in the words of the Court of Criminal Appeal) "at variance with the specific terms of the M'Naughten Rules which definitely fix the crucial time as the time of committing the act." The *ratio decidendi* of the majority is that the summing-up, considered as a whole and in spite of the offending passage, directed the jury's attention to the true issue. The conflict in the medical evidence was as to the true nature of the disease from which G. was suffering before drinking; and the question posed by the evidence was: was the effect of the explosive reactions or outbursts, to which he was then liable, merely to diminish or destroy the power of self-control, or did it prevent him from having any knowledge of the nature or quality of his act or that it was wrong? In answering this question the jury would be deciding whether G. was insane when he did the act, when one of these outbursts was taking place. The majority thus put a different interpretation on the judge's summing-up from that of the Court of Criminal Appeal. Lord Tucker added that if he were wrong and the court below right in this, he would have no hesitation in applying the proviso—a course which the Court of Criminal Appeal had been unwilling to take.

Lord Morris too seems to have taken the view that the right interpretation of the summing-up was that it directed attention to the time of the act. But Lord Denning seems to base his judgment on rather different grounds. He emphasised that the Lord Chief Justice "directed the jury that the time when they had to consider whether he was insane or not . . . was before he started on the bottle of whisky"; that he declined an invitation by counsel to modify this direction; and that this was the point on which the Court of Criminal Appeal reversed him. Lord Denning appears to hold that the Court of Criminal Appeal's interpretation of the direction was correct; and that the direction, so interpreted, was right in law:

"My Lords, I think the law on this point should take a clear stand. If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say he got himself into such a stupid state that he was incapable of an intent to kill. So also when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do."

The apparent difficulty about this is that an intention to do an act at some time in the future is not *mens rea*. If the act is one that is expected to kill, it is not malice aforethought; the *mens rea* must generally accompany the *actus reus*. If D., having resolved to murder his wife at midnight, drops off to sleep and, while still asleep, strangles her at midnight, it is submitted that he is guilty of no crime. But the case of drunkenness may well be distinguishable and is perhaps analogous to the case where a man uses an innocent agent as an instrument with which to commit crime. If D. induces an irresponsible person (*e.g.*, a lunatic or child under 8) to kill, D. is guilty of murder; likewise, where D. induces in himself a state of irresponsibility, with the intention that he shall kill while in that state, the responsible D. is liable for the foreseen acts of the irresponsible D. Whatever the theoretical difficulties, from the point of view of policy, Lord Denning's view has (with respect) everything to commend it. His Lordship's re-statement of the general law on drunkenness as a defence to crime also deserves close attention.

ROAD TRAFFIC

Culpable homicide—causing death by dangerous driving—failure to direct jury on alternative verdict of guilty of dangerous driving—Road Traffic Act, 1956, s. 8

Templeton v. H.M. Advocate

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Guthrie: 1961 S.L.T. 328.[8]

T. was indicted for culpable homicide or alternatively causing death by dangerous driving arising from an accident in which a cyclist died in hospital seven days after having been in collision with a car driven by T. The trial judge directed the jury that the distinction between the charges was one of degree of blameworthiness, that they must be satisfied that the driving was the effective and direct cause of death, and that taking the charges in order they must if satisfied convict, if not, acquit. T. was acquitted of culpable homicide and by a majority found guilty on the alternative charge. On appeal it was argued that in the particular circumstances the trial judge ought *ex proprio motu* to have directed the jury that there was a third option open to them, namely, to convict T. of dangerous driving, and that his failure to do so may have prejudiced the accused.

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[8] For the appellant: *Cullen* (instructed by Alistair R. Brownlie, S.S.C., Edinburgh). For the Crown: *Wylie*, A.-D. (instructed by Lionel I. Gordon, Crown Agent).

Held, that the charge if anything was favourable to the accused, and appeal dismissed.

Commentary. Section 8 (4) of the 1956 Act provides that a jury not satisfied that death has resulted from the accused's driving may convict of an offence under section 11 of the 1930 Act, *viz.*, reckless or dangerous driving. In the present instance the post-mortem examination showed that death was caused by bronchitis due to inhalation of alimentary matter whilst unconscious, although at two distinct points after admission to hospital the deceased's breathing was found to be normal. There was also cogent evidence of bad driving. Founding upon these special circumstances and the jury's obvious reluctance to convict, the appellant argued that the jury's attention should have been directed to the statutory option open to them but this argument was criticised by the appeal court as being derogatory of juries in general and of this jury in particular in that it implied a verdict contrary to the evidence and a disregard of a clear direction to acquit if not satisfied as to causation. The case of *Muir* v. *H.M. Advocate,* 1933 J.C. 46, was distinguished as one in which the judge failed explicitly to direct on culpable homicide as an alternative to murder when this issue had been raised at the trial. It was observed (*per* Lord Guthrie) that the judge's duty was to direct on the live issues at the trial, and although causation was such an issue the application of section 8 (4) was not.

The present case raises such a situation as was figured in the commentary to *R.* v. *Hamilton* [1961] Crim.L.R. 405. While the decision is logically unassailable it can be questioned whether the interests of justice do not require that the directions to a jury reflect the realities of the situation. It can hardly be doubted that the perversity of juries varies in proportion to the stress of decision to which they are subjected. And is there not a point at which the judge must breathe life into an issue, even though overlooked by the parties, to ensure a fair trial?

Against the appeal court's confidence in juries it is ironic to observe that the offence under discussion was created by the legislature because of the reluctance of juries to bring in convictions of the common law crime: *Cf.* Gower, 1960 J.For.Sc.Soc. 1, 33.

[Report and Commentary by ALISTAIR R. BROWNLIE, S.S.C.]

SCOTS LAW

First Offenders (Scotland) Act, 1960—review of sentence

Scott and Another v. Macdonald

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Guthrie: 1961 S.L.T.(Notes) 33.[8a]

S. and another were convicted after summary trial of the theft from their employers of cigarettes worth £100 and, though first offenders on whom the probation officer had favourably reported, were imprisoned for three months. They brought a bill of suspension and liberation complaining that they should have been dealt with by fine or probation:

Held, that the task of deciding sentence was for the court not the probation officer and that the sentences had not been shown to be harsh and oppressive.

Commentary. A summary sentence can only be reviewed where it is harsh and oppressive. In *Stewart* v. *Cormack*, 1941 J.C. 73, Lord Justice-General Normand refused to alter a sentence of 30 days' imprisonment imposed on a youth of otherwise exemplary character, for theft of parts of a lorry, defining oppression as " a disregard of the essentials of justice and the infliction of a penalty not properly related to the crime . . . which is either to be regarded as merely vindictive or as having proceeded upon some improper or irregular consideration or it may be upon some misleading statement of facts." For the different considerations in Scots indictment cases *cf*. the commentary to *McCreadie* [1961] Crim.L.R. 183 and for the English rule that sentence must be manifestly excessive or wrong in principle, see *R.* v. *Nuttall* (1908) 73 J.P. 30, C.C.A.; followed in *R.* v. *Thomas* (1941) 28 Cr.App.R. 21.

The 1960 Act includes a provision that first offenders shall not be imprisoned unless the court is of opinion that no other method is appropriate, echoing the prohibition in the Criminal Justice (Scotland) Act, 1949, s. 18 (2), which restrains imprisonment of youths under 21 on similar terms. The court's inquiry is generally by means of a probation report.

The present case reaffirms that responsibility for sentence remains firmly with the court. Does the 1960 Act really add anything to the law?

[Report and Commentary by ALISTAIR R. BROWNLIE, S.S.C.]

TRIAL

Alibi—judge's charge to jury—onus of proof

McCann v. H.M. Advocate

High Court of Justiciary: Lord Justice-Clerk (Thomson), Lords Mackintosh and Strachan: 1961 S.L.T. 73.[9]

[8a] For complainers: *Kirkwood* (instructed by Armstrong & Hay, S.S.C., Edinburgh). Ror the respondent: *Anderson, Q.C., Sol.-Gen.*; *Carmichael, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

[9] For the appellant: *Sutherland* (instructed by J. Haldane Tait, S.S.C., Edinburgh). For the Crown: *Lord Advocate* (*Milligan, Q.C.*) *Carmichael, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

M. who pleaded a special defence of alibi was tried on indictment for serious assault while acting along with two others and convicted. On appeal against conviction on the ground that the judge's charge failed to direct the jury that the standard of proof required to establish the special defence was balance of probability only:

Held, (*dubitante* Lord Strachan) that despite omission of specific directions the charge as a whole could not be regarded as defective or unfair, and appeal refused.

Commentary. In Scotland the lower standard only is required in proof of a special defence of alibi: *Lennie* v. *H.M. Advocate,* 1946 J.C. 79 and *Dickson* v. *H.M. Advocate,* 1950 J.C. 1; or insanity *H.M. Advocate* v. *Mitchell,* 1951 J.C. 53. In England special pleas require only the lower standard as does proof of insanity: *Sodeman* v. *R.* [1936] 2 All E.R. 1139; matters expressly thrown on the accused by statute: *R.* v. *Carr-Briant* [1943] K.B. 607; and hysterical amnesia: *R.* v. *Podola* [1959] 3 W.L.R. 718; [1959] Crim.L.R. 847.

[Report and commentary by ALISTAIR R. BROWNLIE, S.S.C.]

[In England the onus is on the Crown to disprove a defence of alibi beyond reasonable doubt. J. C. S.]

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Road traffic offences

In R. *v.* HIGGINBOTHAM the court (Glyn-Jones, Howard and Megaw JJ.: August 15, 1961) upheld a sentence of eight years' preventive detention for dangerous driving. H., who was a man of forty-two years of age, had seventeen previous convictions including convictions for stealing motor-cars, taking and driving away motor-cars, garage-breaking and house-breaking. His last conviction was in December 1960 for garage-breaking, stealing and taking and driving away without consent, when a hospital order was made under section 60 of the Mental Health Act, 1959, coupled with an order under section 65 of that Act restricting the freedom of the hospital to discharge him without the permission of the Secretary of State. During the period when H. was receiving treatment at a hospital he walked out, took and drove away a motor-car without consent and, when chased by police, drove dangerously.

Glyn-Jones J., giving judgment, said that H. had shown by his record that the public were not safe from his depredations unless he was kept in custody. In *R.* v. *Smith* [1961] 1 W.L.R. 1046; [1961] Crim.L.R. 565, it had been said by this court that the occasions when a sentence of preventive detention might properly be passed for motoring offences must be exceedingly rare but nevertheless such a sentence would not be excluded in an appropriate case. In the opinion of this court the present case was one where the sentence of preventive detention was appropriate, notwithstanding the fact that the maximum consecutive sentence would have been two years' imprisonment. Such a sentence was imposed for the protection of the public and, accordingly, would in most cases necessarily exceed the sentence which would be awarded if the punitive element alone were considered. With regard to the Mental Health Act, 1959, it was to be observed that the making of a hospital order coupled with a restrictive order under section 65 was not sufficient by itself to ensure that the convicted person would be kept in safe custody. The court making such orders ought to ascertain whether there was a vacancy at a mental hospital where facilities existed for keeping the convicted person in safe custody. Where no such vacancy was available the court might refuse to make a hospital order so that the kind of thing which happened in the present case could be avoided.

Shop-lifting

In R. *v.* DOBSON and SHADE the court (Pilcher, Gorman and Megaw JJ.: May 15, 1961) reduced sentences of nine months' imprisonment in each case to such sentence as would permit immediate discharge. D. and S. had pleaded guilty to two offences of shop-lifting and had asked for two similar offences to be taken into consideration. At the time of the offences D., according to her, had had an invalid husband and six children; and as a result of these difficulties, she had undergone a period of mental strain. S. was also under some domestic strain. Gorman J., giving judgment, said that D. and S. were formerly of blameless character. Serious though their offences were, the sentence of nine months' imprisonment in each case was one which could, in the circumstances, be substantially reduced. Accordingly, this court would make such an order as would enable each of the appellants to be discharged immediately.

Acts and Orders *

Agriculture

See under **Scotland,** below, p. 732.

Animals

The principal Order (S.I. 1960, No. 105) is amended by simplifying the particulars required to be recorded thereunder when cattle are moved to a slaughterhouse or to a fatstock market or certification centre. Operative August 9, 1961. MOVEMENT OF ANIMALS (RECORDS) AMENDMENT ORDER, 1961 (S.I. No. 1493) (3d.).

Betting and Gaming

Provision is made for the coming into force of the Betting Levy Act, 1961 (9 & 10 Eliz. 2, c. 17), in three stages. Article 1 provides, subject to the exceptions mentioned below, that the Act shall come into force on September 1, 1961. The provisions so brought into force include those relating to the establishment of a Levy Board and of a Bookmakers' Committee, and the reconstitution of the Racecourse Betting Control Board as the Totalisator Board. The provisions relating to the transfer of functions between, the accounts of, and reports by the Levy Board and the Totalisator Board are excepted from Article 1 and are, by Article 2, brought into force on January 1, 1962. In addition, Article 1 does not apply in so far as the purposes of assessing and collecting contributions from bookmakers and the Totalisator Board are concerned, and for these purposes Article 3 brings the Act into force on April 1, 1962. BETTING LEVY ACT, 1961 (COMMENCEMENT) ORDER, 1961 (S.I. No. 1545) (3d.). Further Regulations make provision for the constitution of the Bookmakers' Committee established under section 3 of the Betting Levy Act, 1961, and other Regulations prescribe, as respects England and Wales, the particulars of bookmakers' permits granted under th Betting and Gaming Act, 1960, which are required under section 5 (1) of the Betting Levy Act, 1961, to be sent to the Levy Board. Both operative September 1, 1961. BETTING LEVY (BOOKMAKERS' COMMITTEE) and (PARTICULARS OF BOOKMAKERS' PERMITS) REGULATIONS, 1961 (S.I. Nos. 1546, 1547) (each 3d.).

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* Prepared by F. Maurice Drake, Barrister-at-Law.

Diplomatic Privileges

Cyprus is added to the countries included in the Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act, 1961 (9 & 10 Eliz. 2, c. 11), under which diplomatic immunity may be conferred on Commonwealth representatives, and their staffs, attending governmental conferences. Operative August 3, 1961. DIPLOMATIC IMMUNITIES (CONFERENCES) (CYPRUS) ORDER, 1961 (S.I. No. 1508) (2d.).

Factories

Regulations made under the provisions of the Factories Acts, 1937–1959, impose requirements for the protection of persons employed in factories and other places to which the Factories Act, 1937, applies, against ionising radiations arising from (a) sealed sources and (b) machines or apparatus intended to produce ionising radiations or in which charged particles are accelerated by a voltage of not less than five kilovolts. Operative August 15, 1961. IONISING RADIATIONS (SEALED SOURCES) REGULATIONS, 1961 (S.I. No. 1470) (9d.).

For penalties for contraventions see section 130 of the Factories Act, 1937.

Licensing

THE LICENSING ACT, 1961 (9 & 10 Eliz. 2, c. 61) makes important amendments to the Licensing Act, 1953 (1 & 2 Eliz. 2, c. 46), and makes further provision about the sale and supply of intoxicating liquor and about licensed premises, and matters connected therewith. Part I of the Act creates three new types of licences for restaurants, hotels and guest houses, namely (i) a restaurant licence for the sale of drink with table meals, (ii) a residential licence for the sale of drink to residents in residential establishments, private hotels, boarding houses, etc.; and (iii) a combined residential and restaurant licence for residential establishments with a public restaurant. Licensing justices will not be able to refuse the grant or renewal of one of these licences except, broadly speaking, on grounds connected with the character of the applicant, the suitability of the premises and the way in which they have been conducted, the extent to which they are patronised by young persons and, in the case of a restaurant or combined residential and restaurant licence, on the ground that the trade in table meals is insubstantial (section 2).

Where a licence holder is convicted of permitting drunkenness, supplying drunken persons, permitting prostitution, allowing unlawful betting and gaming or harbouring thieves, the court may disqualify him or the premises or both for up to five years in addition to any other penalty (section 3).

Under the provisions of the LICENSING ACT, 1961 (COMMENCEMENT) ORDER, 1961 (S.I. No. 1670), referred to below, licensing justices will be able to grant these new licences at any licensing sessions held on or after November 1, 1961. Notice of application for such licences, which must comply with the new requirements of the Fourth Schedule to the Act, may be given before November 1, 1961.

Part II of the Act amends the general licensing law with regard to permitted hours in licensed premises. As from November 1, 1961 (which is the date appointed by the Commencement Order (S.I. No. 1670), referred to below, the permitted hours on weekdays in off-licensed premises will begin at 8.30 a.m. and continue, without any afternoon break, until the time at which permitted hours for licensed premises generally in that area end in the evening; so that wine merchants and grocers' shops with off-licences, etc., will be able to stay open for the sale of intoxicating liquor throughout the day, but without being compelled to be open for the whole period. From the same date, November 1, 1961, ten minutes will be allowed for " drinking up " at the end of the morning and evening periods of permitted hours, and residents in hotels will be able to entertain their friends outside permitted hours. The permitted hours in premises for which special hours certificates are in force in the West End of London will be extended until 3 a.m. on weekdays (instead of 2 a.m. as at present) and until 3 a.m. on Sunday morning (instead of 12 midnight on Saturday as at present).

With effect from March 1, 1962, the special hours certificate arrangements will be extended to the rest of the country, but with a closing hour of 2 a.m. instead of 3 a.m. as in London. Section 10 provides that licensing justices will be able to grant seasonal licences, *i.e.*, with the provision that the premises need not be open during the whole of the year. The sale of drink under occasional licences (for social functions) will be allowed, at the discretion of the justices, after 10 p.m., and also on Sundays in England and in those parts of Wales and Monmouthshire which, under the provisions of section 6, vote for Sunday opening. (Where there is a vote in favour of Sunday opening this shall be permitted in the administrative county or county borough so voting.)

The remaining provisions of Part II make important procedural changes in the licensing law, which come into effect on November 1, 1961. For a note of the most important provisions see above, p. 708.

Section 21 introduces new provisions for the protection of young persons. Under the present law a licensee or his servant must not knowingly sell drink to a person under 18 in a public house, but there is no restriction on off-sales to young persons or children (except that where the child is under 14 the liquor must be in a corked or sealed container). The prohibition of sales to under 18's is now extended to include off-sales; and the penalty for knowingly selling drink to an "under 18" is increased from the present maximum of £1 for a first offence and £2 on a subsequent offence to £25 and £50 respectively; and on a second or subsequent conviction the licence may be forfeited.

Section 21 further makes it a direct offence for a young person to consume liquor on licensed premises (under the existing law he could only be proceeded against for "aiding and abetting"), with a maximum penalty of £20.

Section 22 increases from £30 to £100 the maximum penalty for infringement of the permitted hours and the penalty for selling liquor without a licence is, from November 1, 1961, to be a maximum of £200 or six months' imprisonment.

Part III of the Act makes new provisions for the registration and control of clubs in which intoxicating liquor is supplied, and these provisions come into operation on March 1, 1962. Sections 31 and 32 give the local authority and fire authority certain powers of inspection of club premises, and subject to certain limitations the police may also inspect the premises in connection with a first application of a club for a registration certificate, but apart from this the existing law under which there is no power of police entry except under a justices' warrant will remain unchanged (s. 34).

The LICENSING ACT, 1961 (COMMENCEMENT) ORDER, 1961 (S.I. No. 1670) (6d.), made on August 28, 1961, brings the Act into force in three stages. Certain provisions set out in the First Schedule (including those referred to above) come into force on November 1, 1961; the procedural provisions of the Act generally come into force on January 1, 1962, and the remaining provisions, set out in the Third Schedule to the Order, become operative on March 1, 1962.

The LICENSING (METROPOLITAN SPECIAL HOURS AREA) ORDER, 1961 (S.I. No. 1671) (3d.), operative November 1, 1961, specifies for the provisions of the Licensing Act, 1961, that part of the metropolis in which the permitted hours for premises in respect of which a special hours certificate is in force end at 3 a.m. The area is the same as that in which special hours certificates have hitherto operated until 2 a.m.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 1434 (Ilford) (2d.); 1456 (Wandsworth) (2d.); 1516 (Islington and St. Pancras) (3d.).

The following Orders have been made with regard to waiting and loading in the London Traffic Area: S.I. Nos. 1529 (certain streets or parts of streets in the parking metered zone bounded by and including Piccadilly, Hamilton Place, Park Lane, Oxford Street, Charing Cross Road, St. Martin's Place, Trafalgar Square, Charing Cross, The Mall and the east side of Green Park), operative August 14, 1961 (3d.); 1533 (certain streets in Westminster and Chelsea), operative August 21, 1961 (3d.); 1534 (certain streets in the Metropolitan Boroughs of Hammersmith, Chelsea, Fulham, Kensington and Westminster), operative August 21, 1961 (3d.).

The LONDON (PROHIBITION OF WAITING) (CLEARWAYS) REGULATIONS, 1961 (S.I. No. 1401) (4d.), operative August 1, 1961, re-enact with amendments a number of earlier regulations (S.I. Nos. 1960/897, 1960/1485, 1961/930). The principal change is that the prohibition on the waiting of vehicles now applies to the main carriageways of additional lengths of trunk roads and also to lengths of other roads.

Merchandise Marks

The principal Order (S.R. & O. 1928, No. 1047), as amended, which prohibits the importation into or the sale or exposure for sale in the United Kingdom of imported ball or roller bearings unless they bear an indication of origin in the manner specified in that Order, is further amended to provide that in the case of any bearing of which the outside diameter is not more than 12·7 millimetres (very slightly over ½-inch) the indication of origin is required to be printed or stamped on its wrapper or container, not on the bearing itself. Operative November 1, 1961. MERCHANDISE MARKS (IMPORTED GOODS) NO. 4 ORDER, 1928, AMENDMENT ORDER, 1961 (S.I. No. 1498) (3d.).

Merchant Shipping

See under **Scotland,** below, p. 732.

Poisons

Certain substances are added to the Poisons List and amendments are made in the entries relating to phenothiazine and the active principles of the suprarenal gland. In addition certain amendments are made which, while making no change of substance, take account of recent changes of nomenclature. The complete list of poisons, as now amended, is set out in the Second

Schedules. Appropriate requirements and restrictions on the sale of the substances now added to the list are made. Both operative September 18, 1961. POISONS LIST ORDER, 1961 (S.I. No. 1611) (6d.); POISONS RULES, 1961 (S.I. No. 1612) (4d.).

Police

POLICE FEDERATION ACT, 1961 (9 & 10 Eliz. 2, c. 51), amends the law relating to the Police Federation. Section 1 provides that chief inspectors and other members of the metropolitan police force below the rank of superintendent shall be members of the Police Federation. Section 3 of the Metropolitan Police Act, 1933 (23 & 24 Geo. 5, c. 23) which excluded certain inspectors in the metropolitan police force from membership of the Federation and of the Branch of the Federation formed from members of that force, is repealed. Section 2 provides for separate representation for policewomen on the boards, branch boards, central conferences and central committees of the Federation. The Act comes into force on a day to be appointed by the Secretary of State, and different days may be appointed for England and Scotland. The Act does not apply to Northern Ireland.

The Governments of the United Kingdom and of the Federal Republic of Germany have exchanged Notes under which they have agreed that the National Central Bureau at New Scotland Yard and the Bundeskriminalamt shall, so far as possible, assist each other in criminal matters. It is, however, agreed that such assistance shall not be granted (a) in matters of a political, racial or religious character or (b) if it would be prejudicial to the essential interests of the State to grant it. The agreement came into operation on May 2, 1961. (Cmnd. 1446.)

Rivers

See under **Scotland,** below, p. 732.

Road Traffic

Previous Regulations (S.R. & O. 1941, No. 926, and S.I. 1949, No. 253) are revoked and consolidated with amendments, which for the most part are of a minor character and include (1) provision for slightly modified forms of insurance certificates with the relevant statutory references brought up to date (regulation 5 and the Schedule), existing forms being permitted to be issued for a period of two years, and (2) the penalty for contravention of any of the

Regulations is increased from £5 to £20 for each offence (regulation 14). Operative August 21, 1961. MOTOR VEHICLES (THIRD PARTY RISKS) REGULATIONS, 1961 (S.I. No. 1465) (6d.).

For penalties for contraventions, see regulation 14 of these Regulations.

The Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955, No. 482) are further amended to provide (1) that the definition of the overall length of a vehicle is amended to exclude from that length any expanding or extensive contrivance forming part of a turntable fire escape fitted to a vehicle (reg. 2 (1)); (2) that the overhang (as defined in reg. 3 (1) of the 1955 Regulations) of heavy motor-cars and motor-cars not exceeding twenty feet in overall length may be increased by not more than nine inches and that of such vehicles exceeding that length may be increased by not more than fifteen inches, so long as the overhang, as so increased, does not exceed 7/24ths of the overall length of the vehicle (reg. 2 (2) and (3)); and (3) that regulation 3 (4) of the 1955 Regulations as amended by S.I. 1959, No. 1936, which provides that for the purpose of those Regulations, with the exception of subparagraph (*c*) of regulation 4A (3) (which relates to the use of three-wheeled land tractors in certain circumstances), two wheels of a vehicle are to be regarded as one wheel if they are less than eighteen inches apart, is further amended by revoking as from October 1, 1961, the said amending Regulation of 1959, so that the exception referred to above is no longer operative (reg. 3). Regulations 1 and 2 became operative September 1, 1961, and regulation 3 becomes operative October 1, 1961. MOTOR VEHICLES (CONSTRUCTION AND USE) (AMENDMENT) (NO. 2) REGULATIONS, 1961 (S.I. No. 1587) (3d.).

For penalties for contraventions, see section 239 of the Road Traffic Act, 1960.

See also under **Scotland,** below, p. 81.

Scotland

The Removal of Vehicles (Scotland) Regulations, 1957, are re-enacted with amendments. The main changes are (1) the powers of a constable to move a vehicle on a road or to remove it from a road on the ground of obstruction are no longer made subject to the limitations which were contained in the earlier Regulations (reg. 5); (2) certain local authorities are empowered to remove from roads in their areas vehicles which appear to have been abandoned (reg. 6); and (3) the police and local authorities are authorised, after a certain time and subject to certain steps having been taken to give the owner the opportunity to claim the vehicle, to sell or otherwise dispose of a vehicle removed by them from a road on the grounds that it appears to have been abandoned. Operative September 1, 1961. REMOVAL OF VEHICLES (SCOTLAND) REGULATIONS, 1961 (S.I. No. 1473) (4d.).

September 1, 1961, is appointed as the date on which, in relation to the Burgh of Arbroath and those parts of the counties of Angus and Kincardine not within the area of any River Purification Boards, (1) the provisions relating to the prevention of pollution contained in Part III of the Rivers (Prevention of Pollution) (Scotland) Act, 1951 (14 & 15 Geo. 6, c. 66), come into operation; (2) the provisions of that Act have effect in substitution for any local enactment inconsistent therewith, and (3) the enactments specified in the Fourth Schedule are repealed to the extent specified in that Schedule. Operative September 1, 1961. RIVER PURIFICATION AUTHORITY (COMMENCEMENT NO. 12) ORDER, 1961 (S.I. No. 1492) (3d.).

Sellers of mixtures of seeds are now permitted to declare the proportion by weight of each constituent of the mixture without expressing those proportions in terms of percentages, as would otherwise be necessary to comply with the Seeds (Scotland) Regulations, 1961 (S.I. 1961, No. 274) 1. Operative August 1, 1961. SEEDS MIXTURES GENERAL LICENCE (SCOTLAND), 1961 (S.I. No. 1515) (3d.).

Provision is made for the registration for the purposes of the Merchant Shipping Acts of ships owned by the Secretary of State for Scotland for the purposes of the Highlands and Islands Shipping Services Act, 1960 (8 & 9 Eliz. 2, c. 31). Operative August 21, 1961. MERCHANT SHIPPING (REGISTRATION OF SHIPS) (HIGHLANDS AND ISLANDS SHIPPING SERVICES) ORDER, 1961 (S.I. No. 1514) (3d.).

See also under **Police.**

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 *New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

86. *Road traffic—failure to comply with a traffic sign constituting careless driving—whether there can be two convictions for same offence*

I would be most grateful if you could let me have your views with respect to the following: In this area we have a large number of careless driving cases, and in many of them the careless driving largely consists of a wrongful crossing of double white lines with the resultant danger to oncoming traffic. Invariably the police prosecute for careless driving and for failing to conform to a traffic sign. I have taken the view that as the crossing of the double white line is very much the ingredient of the careless driving charge, the justices should not impose two penalties for what appears to be one act. The superintendent of police thinks that there ought to be two convictions and two penalties imposed. My view is that if the justices did that, it would be a case of punishing a defendant twice for substantially one act, and I will be much obliged if you will indicate whether in your opinion this view is correct. [J. W.]

ANSWER

The answer to this question must, I think, depend on the exact circumstances of each case and on what exactly the court has held in each case to constitute careless driving.

Whether or not double lines are marked on a road, to drive over the centre line may still be careless or inconsiderate driving in certain traffic conditions. It is hardly likely that the police would prosecute for careless driving if crossing the double lines had not inconvenienced some other person. A conviction for careless driving which was based entirely on the defendant's breach of his normal duties to other road users would not, in my view, preclude a conviction also for failing to conform to a traffic sign. If, however, the justices include the crossing of the double lines as one element in the careless driving, then the defendant cannot be convicted also of the other offence. This last follows from the decision in *Welton* v. *Taneborne* (1908) 72 J.P. 419, which, however, left the wider legal position in some doubt. It was a case in which a magistrate had refused to convict the defendant of exceeding a speed limit because he had taken the question of speed into consideration as an element of danger when recording a conviction for driving in a manner dangerous to the public. By a majority decision, the Divisional Court upheld the magistrate on a case stated. Sutton J. considered that the case was governed by *Wemyss* v. *Hopkins* (1875) 39 J.P. 549, which, presumably, meant that he regarded the lesser offence as included in the greater in all circumstances. Lawrance J., however, based his decision largely on the fact that speed had formed part of what influenced the court in finding danger to the public, and he visualised the possibility that the magistrate might have said that "if it had not been for the speed I would still have convicted . . . of driving to the danger of the public." Jelf J., in his dissenting judgment, held that the two offences were quite separate and that convictions could properly be recorded on each. He did, however, add "when it comes to a question of punishment it would be wrong to add to the punishment of the man." [A. E. J.]

Books and Periodicals

Book reviews:

Moriarty's Police Law. 16th ed. By W. J. Williams, O.B.E., B.SC., LL.B., Chief Constable of Gwynedd Constabulary. London: Butterworths. 1961. 639 pp. (including indices, etc.). 16s. 6d. net.

Having examined this latest edition of this standard textbook for police officers, I had occasion to look at my review of the 15th edition.

At that time, I expressed the hope that Colonel Williams would succeed in preserving the simplicity of design, the ease of reference and the virtue of compression without omission, which one always associates with this book.

The new editor has now surmounted two very difficult hurdles; the Road Traffic Act, 1960, and the Betting and Gaming Act, 1960. In doing so, he has shown that we need have no fears for the future of *Moriarty*. Writing of the new Road Traffic Act in the Preface, Colonel Williams says that it has made the work of revision difficult and protracted. This, considering the part it plays in any book of Police Law, is probably an understatement. The inclusion of the 11th Schedule of the Act as an appendix is an excellent idea and the only major innovation in the whole book.

Having congratulated the editor on his work and for very worthily carrying on in the great tradition, perhaps mention might be made of two matters which might receive his attention before the next edition. A word or two extra in the paragraph on "certificates of dismissal" in proceedings for assault would considerably increase the accuracy, particularly having regard to the standard needed in present-day police examinations. Similarly, I am not too happy with the opening paragraphs of the chapter on Forgery. But, let me hasten to add, these are very minor matters in a book, which is still the young policeman's best friend.

H. V. H.

The Murder of Lord Erroll. By Rupert Furneaux. London: Stevens & Sons, Ltd. 1961. x and 180 pp. 22s. 6d. net.

The Murder of Lord Erroll is the latest release in this publisher's "Crime Documentaries"—patterned after the earlier "Famous Trials" series.

It seems a strange case for Mr. Furneaux to have chosen to follow his first two successes. The facts are interesting enough; set in Kenya in 1940 against a background of the fashionable club society, peopled by the nobility of the colony. It seems that the international career of playboy Lord Erroll was abruptly terminated on a lonely African road late one night, only hours after his successful courtship of Lady Broughton, two months' bride of the elderly Sir Delves, African sportsman. Shreds of evidence, the murder bullets, stolen revolvers and the almost too convenient "enraged husband" motive result in the prosetion of Broughton for Erroll's murder.

So far, one would agree that the author has chosen his material well, but it doesn't last. There seems to be no one audience for which this report was intended, and perhaps for that reason it lacks direction and purpose.

The counsel involved are not of the calibre to attract students of court-room mastery, nor, indeed, are their speeches set out at any length for the keenest to glean what they might from them. The Crown's case hinging upon the identification of the murder bullets, a good quarter of the account of the trial is given over to intricate ballistics evidence, rather heavy for the average reader, and completely devoid of photographs or even diagrams to serve the expert.

Nevertheless, the trial has its moments, and contains some interesting sidelights on the advisability of prosecutions founded almost entirely upon possible motives and opportunity.

B. E. C.

Books received:

The Concise Encyclopedia of Crime and Criminals. Edited by Sir Harold Scott. 1961. London: Andre Deutsch. 352 pp. (including bibliography and 96 plates). 50s. net.

Cases and Materials on Evidence. By J. D. Morton. 1961. Toronto: Butterworths. Obtainable in the U.K. from Butterworths, London. xxii and 668 pp. (including index). 65s. net.

Evidence in Criminal Cases. A Basic Guide. By J. D. Morton. 1961. Toronto: Butterworths. Obtainable in the U.K. from Butterworths, London. viii and 64 pp. (including index). 7s. 6d. net.

Readers' digest:

Betting and Gaming: The problem of bingo clubs: 232 *Law Times* 115.

Juveniles: Ingleby Report: suggested new reforms: 17 *The Magistrate* 109. The work of the Children's Department 1955–1960: 125 *Justice of the Peace* 540.

Licensing: The Licensing Act, 1961: 111 *Law Journal* 543 and 559.

Offences against the Person: Compensation for victims of crimes of violence: 232 *Law Times* 101; 111 *Law Journal* 513.

Road Traffic: Some recent highway cases: 125 *Justice of the Peace* 536; The use of dumpers on roads: 69 *Police Review* 701 and 719.

Sentence: *Prisons*: Work in prisons: 125 *Justice of the Peace* 535.

Statutes: The Mock Auctions Act, 1961: 105 *Solicitors' Journal* 733; Consumer Protection Act, 1961: 125 *Justice of the Peace* 536.

Trade Disputes: Peaceful picketing: 111 *Law Journal* 543.

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1961

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.*4. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

November 1961

No idle threat

One James Garrigan has had the dubious distinction of being the first appellant before the Court of Criminal Appeal to have his sentence increased since the court issued the reminder recently that it had the power to take this course and warned that it would do so in appropriate cases. In the last few years this power has been markedly unused, and those asked for guidance on the advisability of an appeal against sentence have perhaps tended to observe upon the danger of an increased sentence as being theoretical rather than real.

The doubling of Garrigan's sentence so soon after the general warning suggests that the judges are in earnest. The present court is, if we may respectfully say so, an enlightened one, and the man deserving sympathy or mercy is likely to be mercifully and sensibly treated; but the criminal without something special to urge in mitigation is likely to be treated with a proper severity.

The new mood of the court (if our interpretation is correct) is of interest in a number of ways. First, it will tend to discourage frivolous applications for leave to appeal. Secondly, it may partly explain the court's further intimation that, save by consent, an application for leave to appeal against sentence will not, on leave being granted, be treated as the appeal, which will now normally be heard on another day: appellants are nowadays commonly represented, and counsel will have time to consider whether a storm is brewing and how best to protect his client from it. Thirdly, the attitude to sentences of the appeal court should have an effect upon trial judges.

A strengthening of the police force to the point where detection and conviction become significantly greater risks, and an all-round increase in the penalties imposed for serious crimes, might together amount to a deterrent sufficiently impressive to affect the minds of a marginal sector of the criminal class. And that would be something. Or is it wishful thinking?

After-care

The 1960 Annual Report of the Council of the Central After-Care Association has recently been published. It makes depressing reading. This is through no fault of the Association or of those who help it to discharge its functions. The picture presented is one of a devoted body of people, with the help of an overworked probation service to handle the majority of the case-work, contending with outsize loads of discharged persons and existing clients and with predominantly disappointing (sometimes intractable) human material.

The present difficulties of the Association being what they are, it is no surprise that the Home Secretary has asked the Advisory Council on the Treatment of Offenders to review the arrangements for the organisation of statutory and voluntary after-care in the light of the changes provided for by the Criminal Justice Act, 1961. The Act contemplates the extension of statutory after-care to large new categories of offenders and to persons released from detention centres. Without adequate manpower the new scheme cannot function; the manpower in question must be found within the probation service. The reports of the Advisory Council and of the Departmental Committee on the Probation Service will be awaited with anxious interest.

"Denmark—A New Look at Crime"

In May 1961, members of the Institute for the Study and Treatment of Delinquency visited Denmark to study that country's penal system and institutions. A record of the tour is available in a booklet by Dr. James McWhinnie under the above title, published by the I.S.T.D.

The party found "a great deal in the Danish penal and social provisions that was . . . most impressive, and could profitably be considered for adaptation and use in Britain." We may whet the appetites of Dr. McWhinnie's potential readers by mentioning a few general features: the organisation of prisons as "therapeutic communities" rather than as places of detention; the reflection in penal institutions of a policy of simulating conditions in the outside world as far as possible; the widespread use of individual training and treatment programmes; the part played by prison staffs in the after-care of their prisoners; and the (by our standards) extraordinary emphasis on the "welfare" approach to juveniles—there are no juvenile courts, fifteen is the minimum age of criminal responsibility, and decisions in the cases of almost all persons up to eighteen years of age are in practice made by Child Welfare Committees.

How many elements of the Danish system could be suitably amended for use in this country would depend largely upon an assessment of the relevance of differing social conditions and upon our resources of manpower and money. Denmark has some advantages in the latter respect: at closed institutions, for instance, the ratio of staff to prisoners is nearly 1 to 1. Much of what the Danes manage to do, one supposes, would be impossible without personnel of the numbers and type available to them.

Certainly, however, during this period of travail in our own penal system we must be eager to learn what we can from other systems and prepared to flatter by imitation whenever appropriate. Reading this fascinating document one strongly suspects that some undoubted "advances" are being described which it would be folly not to examine with the closest possible attention.

An inadequate penalty

The inadequacy of some maximum fines was neatly illustrated recently in a case at quarter sessions.[1] The recorder found that the greatest fine that he could impose upon a defendant on a charge of assaulting a police officer was £20. The defendant was a labourer of eighteen who had as much as £15 pocket money a week. A fine of £20 would be, in the recorder's language, "ridiculous." The case was not one calling for imprisonment or borstal training and in the result a probation order for three years was made, with stringent conditions.

Had the charge been laid under a different section (presumably the Offences against the Person Act, 1861, section 38, though the press report is not clear) the recorder would have been able to impose the fine of £240 that he wished to make the youth pay at the rate of £5 weekly. There seems to be no good reason for the existence of a multiplicity of statutory provisions dealing with the one offence of assaulting a policeman, and it is an anomaly that the defendant's fortune should have depended so greatly on what was from his point of view an accident. The offence should surely be covered by one section and punishable (no doubt in different ways) on summary conviction or on conviction on indictment.

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[1] See *The Times,* October 17, 1961.

But in any case the maximum fine imposable by magistrates for this offence should be reviewed. £20 for this offence—£5 for obstructing a constable in the execution of his duty—these penalties are hardly appropriate to the type of persons committing such offences in this age of juvenile affluence.

Judicial appointments

Sir Patrick Devlin has been appointed a Lord of Appeal in Ordinary.

Sir William John Kenneth Diplock has been appointed a Lord Justice of Appeal.

The following have been appointed Judges of the Supreme Court of Judicature and assigned to the Queen's Bench Division of the High Court:

Mr. Bernard Joseph Maxwell MacKenna, Q.C.
Mr. Alan Abraham Mocatta, Q.C.
Mr. John Thompson, Q.C.

Mr. Norman Roy Fox-Andrews, Q.C. has been appointed Recorder of Bristol.

Mr. William Walter Stabb has been appointed Chairman and Mr. Niall MacDermot, O.B.E. and Mr. Robert Davison Lymbery have been appointed Deputy Chairmen of Bedford County Quarter Sessions.

Mr. Joseph Stanley Watson, M.B.E., Q.C. has been appointed Recorder of Blackpool.

The Scope of Fraudulent Conversion—I

By J. C. SMITH, M.A., LL.B.
Barrister-at-Law, Professor of Law in the University of Nottingham

Section 20 (1) (iv) of the Larceny Act, 1916, provides that:

> " Every person who—
>
> (*a*) being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody, or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; or
>
> (*b*) having either solely or jointly with any other person received any property for or on account of any other person; fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof; shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment for any term not exceeding seven years." [1]

If this provision is interpreted literally it would seem that fraudulent conversion duplicates several of the crimes which are created by other sections of the Larceny Act: *i.e.* that an act which is a crime under one of those sections will also amount to an offence under section 20 (1) (iv). The following crimes would seem to amount also to fraudulent conversion:

1. Larceny by a bailee (s. 1 (1)).
2. Larceny by a clerk or servant (s. 17 (1) (*a*)).
3. Embezzlement (s. 17 (1) (*b*)).

A bailee is a person who is entrusted with property for a specific purpose, or who receives property for or on account of another person, within the literal meaning of the words of s. 20 (1) (iv) of the Act. So is a clerk or servant who receives property from his master, or from a third party for his master. The bailee or clerk or servant who fraudulently misappropriates the property entrusted would seem, therefore, to be guilty of fraudulent conversion as well as one of the above-mentioned crimes. It has, however, been argued that the subsection must be narrowly interpreted to apply only to persons who have acquired *ownership* in the property, before converting it, and so to exclude the bailee and clerk or servant. The bailee has possession; so has the servant who receives property from a third person for his master; while the servant who receives chattels from his master has custody merely; but none of them has ownership.

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[1] Section 20 (1) (iv) re-enacts the Larceny Act, 1901, which repealed and replaced sections 75 and 76 of the Larceny Act, 1861.

Clearly there is no warrant for such a narrow interpretation in the words of the subsection, considered in isolation. Mr. J. W. C. Turner, the learned editor of *Russell on Crime* argues,[2] however, that we must look as the subsection (*a*) in the light of the history of the matter with which it deals; and (*b*) in the context of the whole Act. It then appears, in his view, (a) that the object of the subsection was to close a gap in the law; and the gap was that owners of property could not be convicted of stealing it; and (b) that, since persons other than owners are dealt with by other sections, the Act can be construed as a consistent and harmonious whole only by confining section 20 (1) (iv) to owners. It is contended that it is absurd that a single statute should provide alternative maximum penalties of 14 years (section 17) and 7 years (section 20 (1) (iv)) for the same deed and that it should be a misdemeanour under the one section and a felony under the other. A similar statement of the law is made by Sir Fred Pritchard in *The Common Calendar,*[3] apparently for similar reasons.

Mr. Turner has also incorporated his views into Kenny, *Outlines of Criminal Law.*[4] It is interesting to note, however, that Kenny himself thought that fraudulent conversion could be committed by a non-owner as well as by an owner. This appears from his summary of the various forms of theft (5th ed., p. 237). Discussing the case where " the owner gives up both physical and legal possession; and then the possessor appropriates," he points out[5] that " If possession were obtained *bona fide,* then the subsequent appropriation is no crime at common law. But by statute, even if possession were obtained *bona fide,* yet if it had been obtained . . . (c) by an Agent who comes within the Larceny Act, 1901, appropriation by him is a misdemeanour " (*sc.* fraudulent conversion). This case is contrasted with that where "The owner gives up not only physical and legal possession, *but also ownership*." Here, too, Kenny thought that the appropriator could be guilty of fraudulent conversion. His examples of fraudulent conversion were: "a lodger is sent by his landlady with £1 to pay her rates; or a stockbroker received from a client £100 to buy Consols with." The first is very probably a case of bailment.

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[2] 11th edition, pp. 1261 *et seq.* One argument which might have, but has not, been used is that fraudulent conversion, being a misdemeanour, merged in the felony, whenever the evidence showed that a felony had been committed. This was undoubtedly so at common law, and Mr. Turner believes that it is still so: *Russell on Crime* (11th ed.), p. 208–209. It is submitted that the better view, however, is that the doctrine of merger was abolished by the Criminal Procedure Act, 1851. See Glanville Williams, *The Criminal Law* (2nd ed.) 653; Colin Howard, 24 M.L.R. 166; and the present writer [1961] Crim.L.R. 436.

[3] p. 33.

[4] 17th edition, pp. 313 *et seq.*

[5] At p. 237 of the 5th edition. (This edition is quoted rather than any of the others prepared by Kenny's own hand for no better reason than that it happens to be the edition available to the writer.)

The previous editor [6] of *Outlines of Criminal Law* also evidently thought that fraudulent conversion could be committed by a bailee. The example given of a conversion of property entrusted for retention in safe custody is "furniture under a hire and purchase agreement," though no authority is cited.[7] It is clear that such a hirer is merely a bailee and can be convicted of larceny as such: *R.* v. *MacDonald.*[8] In these circumstances a closer look at the reasons advanced for the narrow interpretation of section 20 (1) (iv) seems desirable.

The historical argument

Section 20 (1) (iv) re-enacts the Larceny Act, 1901,[9] which in turn repealed and replaced sections 75 and 76 of the Larceny Act, 1861.[10] Sections 75 and 76 themselves modified and replaced section 49 of the Larceny Act, 1827,[11] which modified and replaced the Banker's Embezzlement Act of 1812.[12] The 1812 Act was, then, the *fons et origo* of the present law through the language used in the present section bears little resemblance to the original enactment. The 1812 Act was the direct result of the case of *R.* v. *Walsh,*[13] so the nature of that case is clearly important in the present problem.

Sir Thomas Plumer gave to Walsh, a stockbroker and Member of Parliament, a cheque for £22,200 which he directed him to lay out in the purchase of exchequer bills. Walsh cashed the cheque but purchased exchequer bills to the amount of only £6,500. With the balance of the money he fraudulently purchased American share certificates and a quantity of bullion with which he absconded, intending to go to America. Walsh was charged on one count with larceny of the cheque and in another with larceny of the bank notes which he had received for it. The case was very fully argued in the Exchequer Chamber before all the judges. According to Taunton, no judgment was ever delivered. Walsh was pardoned as the result of a letter by Macdonald L.C.B., who tried the case, to the Home Secretary. The letter stated that all the judges were of the opinion that Walsh was not guilty of a felony, but did not give reasons. The reporters, Russell and Ryan, however, say that the judges held that the conviction was wrong—

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[6] Godfrey C. Phillips.

[7] See 15th edition, p. 272.

[8] (1885) 15 Q.B.D. 323.

[9] 1 Edw. 7, c. 10.

[10] 24 & 25 Vict. c. 96.

[11] 7 & 8 Geo. 4, c. 29.

[12] 52 Geo. 3, c. 63.

[13] (1812) 4 Taunt. 258; 128 E.R. 328.

> " because there was no fraud or contrivance to induce Sir Thomas Plumer to give the cheque, because it could not be called his goods and chattels, and was of no value in his hands; because he had never had possession of the money received at the bankers, so that it could not be called his money; and because the bankers were discharged of the money by paying it on the cheque, so that they were not defrauded and it could not be said that the money was stolen from them." [14]

This, perhaps, requires some elucidation. The relevance of the " fraud or contrivance " was that if a bailment was induced by a trick, the fraudulent bailee was guilty of larceny under the doctrine of *Pear's Case*.[15] This seems to be a clear indication that Walsh was held to be a bailee of the cheque. If he had become the owner of it, he could not have been guilty of larceny whether there was fraud or not.[16] The second reason, that the cheque was not larcenable, has been repudiated by later cases [17] in which it has been held that a cheque in the hands of the drawer is of value and can be stolen from him by his servant.

If Walsh was a bailee of the cheque, he was also, according to later decisions. a bailee of the notes which he obtained for it: *R.* v. *de Banks* [18] and *R.* v. *Governor of Holloway Prison, ex parte George*.[19] In both these cases the accused were held to be guilty of larceny as bailees of property which they had acquired in a manner precisely similar to that in which Walsh obtained the notes. But in 1812, there was no crime of larceny as a bailee and there could be no larceny at common law from one who had never had possession of the thing in question. This had been settled thirteen years earlier in *R.* v. *Bazeley*,[20] where a bank clerk misappropriated a note handed to him in the bank by a customer, and was held to be not guilty, apparently (this also was a case in which no judgment was delivered) on the ground that the note was never in the possession of the bankers as distinct from the prisoner. It is apparent then that the gap in the law was not simply one which exculpated the *owner* of property who misappropriated it. It was the much wider category, bailees, generally, who were excluded from legal sanctions, except under the doctrine of breaking bulk and larceny by a trick.

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[14] R. & R. 215; 168 E.R. 767. For a different view as to the reasons which required Walsh's acquittal, see J. W. C. Turner [1956] Crim.L.R. 670, and Stephen, *History of the Criminal Law*, iii, 154.

[15] (1779) 1 Leach 212; 168 E.R. 208; 2 East P.C. 685.

[16] See further [1957] Crim.L.R. 722.

[17] *R.* v. *Metcalfe* (1835) 1 Mood. 433; *R.* v. *Heath* (1838) 2 Mood. 33.

[18] (1884) 3 Q.B.D. 29.

[19] (1879) 18 Cox 631.

[20] (1799) 2 Leach 835; 168 E.R. 517.

The Banker's Embezzlement Bill was introduced by Mr. Drummond who stated [21]:

> "The Bill now proposed to be brought in could hardly be said to be an addition to the criminal code of the country; it was more properly an extension of an Act already in existence, by which it was made felony for servants or clerks to embezzle or misapply the property of their master entrusted to them."

The Act referred to was 39 Geo. 3, c. 85 which had created the crime of embezzlement by a clerk or servant as a result of the acquittal of the bank clerk in *R.* v. *Bazeley*. Embezzlement then, as now, consisted in the misappropriation by a servant of property received by the servant from a third party for his master. If, then, Sir Thomas Plumer had handed the cheque to a servant of Walsh for conveyance to his master and the servant had misappropriated the cheque, he would have been guilty of a felony. The anomaly which the Bill sought to rectify was that the master committed no crime if he behaved in a precisely similar manner. Mr. John Smith, seconding the Bill, said [22]:

> "The object of the Bill was in a great measure to assimilate the law which now punished the master to that which now punished the servant . . . if a servant embezzled property entrusted to him he was thereby guilty of felony, whereas the master for the same act was only adjudged criminal for a misdemeanour." [23]

The reference to a misdemeanour seems to have been based on a misconception, which appears in the debates, that Walsh might, if appropriately charged, have been convicted of some unspecified misdemeanour. The Attorney-General, Sir Vicary Gibbs, and the Chancellor of the Exchequer, Spencer Perceval, indicated that this was not so; and the Bill which, when introduced, apparently created a felony, was modified so that the Act established only a midemeanour.[23]

It is clear that the sponsors of the Bill were not directing their minds exclusively to the narrow class of owners of property with which they had been entrusted by others. Their object was to make the specified classes of agents liable for such misappropriation of property as, if they had been servants, would have been embezzlement. As will appear below, servants who commit embezzlement are generally bailees of the property embezzled; and agents who received property in similar circumstances would hold it in the same character. The words of the Act, moreover, are clearly apt to include cases of bailment. The offences created by it include, for example, the "embezzlement" of "plate jewels and other personal effects, deposited for safe custody or for any special purpose with bankers, merchants, brokers, attornies and other agents, entrusted by their customers and employers." It is difficult to conceive of a deposit of jewellery for safe custody which would not amount to a bailment.

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[21] Cobbett's *Parliamentary Debates,* XXI, 943. 1 Edw. 7, c. 10.

[22] *Ibid.*

[23] *Ibid.,* 1214.

If the Act is construed in the light of the mischief at which it was aimed, there is no reason for confining its operation to owners. *Walsh's Case,* as contemporarily reported by Russell and Ryan, turned not on his ownership of either the cheque or the notes, but on the inviolability of bailees; the class of persons outside criminal sanctions was certainly wider than owners; and the expressed intention of the sponsors of the bill was wider. There is nothing here to warrant putting a drastic limitation on the plain words of a statute; and the plain words seem to include certain bailments.

It should be noted that this statute did not at that time overlap other offences; for there was as yet no general crime of larceny by a bailee and the restriction of the Act to certain classes of agents prevented it from duplicating embezzlement by clerks and servants. The modifications made by the Larceny Acts of 1827 and 1861 seem to be mainly in style rather than in substance though they both apply to "any chattel" instead of being confined to the particular chattels mentioned in the 1812 Act. Overlapping with larceny by bailee, if it exists, arises not because of the fraudulent conversion statutes but because of the 1857 Act which made larceny by bailees generally an offence.

The object of the Larceny Act, 1901, was to widen the law of fraudulent conversion in three respects. The 1861 Act (1) in many cases required that the agent should have had directions in writing; (2) did not apply to agents to receive as distinct from agents to pay; and (3) applied only to the specific classes of agents mentioned and others *ejusdem generis.*[24] It is the general words used by the 1901 Act to achieve objects (2) and (3) which so extended the definition of fraudulent conversion that it now appears to apply to servants as well as agents and to comprehend embezzlement within its terms.

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[24] 65 J.P.N. 299, 380, 507.

Overlapping within the Larceny Act

If the Larceny Act, 1916, were a statute enacting new law, the argument advanced in Russell, that the Act must be construed as a consistent and harmonious whole, would be very persuasive; but it is, of course, a codifying act which brings together the development of centuries, both in statute and common law. This fact means that it would not be really surprising if the Act were not a harmonious whole and if some inconsistency and overlapping were to be found therein and, indeed, these are not hard to find. In the "blackmail" offences defined by sections 29–31 of the Act it has been expressly held that the same deed may be both the felony, punishable under section 29 (1) (i) by imprisonment for life, and the misdemeanour, punishable under section 31 by two years' imprisonment. In *R.* v. *Kendrick and Smith* [25] the Court of Criminal Appeal held that a conviction under section 31 would not sustain a plea of autrefois convict on a subsequent charge under section 29 (1) (i) even though the two charges were supported by the same evidence. The court found no difficulty in deciding that the same deed might constitute both offences:

> "The fact that the evidence is the same, or that the facts proved are the same, does not make the two offences identical. They are quite distinct and separate. It may be that the greater includes the less, and that if you prove a case under section 29 you must prove a case under section 31, but I do not decide that this is so."

Even within the group of crimes, whose relationship to fraudulent conversion is in issue, the same phenomenon may be observed. The conclusion seems to be almost inevitable that there is an overlap between section 1 (1), in so far as it makes conversion by a bailee larceny, and section 17 (1) (*b*), which defines embezzlement. A servant receiving property from a third party acquires possession (and not merely custody) of it, and, for this reason, could not steal it at common law: *R.* v. *Bazeley*.[26] This, as we have seen, was why it was necessary for the legislature to enact the crime of embezzlement. At that time a bailee could not commit larceny (except by breaking bulk), but in 1857 a statute [27] made conversion by a bailee larceny, whether he broke bulk or not. Now the servant receiving property from a third party for his master seems to satisfy all the requirements of a bailee. The point is taken expressly by Pollock and Wright in their *Essay on Possession in the Common Law*[28]: "... the rule is settled in our modern law that a servant does not possess by virtue of his custody, except in one case, namely, when he receives a thing from the possession of a third person to hold for the master: and then he is held to possess *as a bailee* until he has done some act by which the thing is appropriated to the master's use." According to Paton[29] the two main features of bailment are "(1) delivery of possession, or in some cases transfer of possession of personal property; (2) a specific mandate which requires the identical *res* either to be returned to the bailor, or to be dealt with in a particular way." The law is stated similarly in books on criminal law. According to Kenny,[30] the requisites for the offence of larceny by a bailee are "(a) that the owner passed the *possession* of the thing (but *not* the ownership) to the prisoner for some time limited expressly or impliedly; (b) that at the expiration of that time the identical thing was to be returned to the owner or delivered to someone else; (c) that the prisoner had fraudulently appropriated the property, etc." The servant who embezzles seems to satisfy all these requirements.

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[25] (1931) 144 L.T. 748.

[26] (1799) 2 Leach. 835.

[27] 20 & 21 Vict. c. 54, s. 4.

Of course, servants are always prosecuted for embezzlement and not larceny as bailees. But if they *could* be prosecuted for larceny, a good deal of force is taken out of the argument that the Act is a consistent and harmonious whole; and it is very difficult to see why they could not be successfully so prosecuted.

Finally, there seems to be a clear case of an overlap between section 20 (1) (ii) on the one hand and sections 1 (1) and 17 (1) (*a*) and (*b*) on the other. Section 20 (1) (ii) provides that a person commits fraudulent conversion who:

> "being a director, member or officer of any body corporate or public company takes or applies for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company."

This subsection by its express words, contemplates a taking or application of property which does not belong to the taker or applier. If a director of a company helps himself to the silver teapot from the company's boardroom sideboard and sells it for his own benefit, he would surely be guilty of simple larceny under section 1 (1). If the company secretary, an officer of the company, applies for his own benefit cheques with which he has been entrusted by the managing director, he is guilty of larceny as a servant under section 17 (1) (*a*); while if he similarly disposes of a cheque received from a third party for the company he is guilty of embezzlement under section 17 (1) (*b*). Each of these cases also falls within the plain words of section 20 (1) (ii).

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[28] p. 60. *Cf.*, however, the apparently inconsistent remarks on p. 168.

[29] *Bailment in the Common Law*, p. 6.

[30] 17th edition, p. 252. See also Cross and Jones, *Introduction to Criminal Law*, p. 172.

Though the point was made by counsel in *R.* v. *Scranton*[31] that " it could not be a felonious conversion and a conversion which was the subject of misdemeanour by the same statute," he did not think it necessary to argue the point, and it seems never to have been the subject of a direct judicial decision. It is thought, nevertheless, that an examination of the cases will afford some guidance in the matter.

Must the accused be an owner?

A good starting point for a discussion of this question is the case of *Grubb*,[32] a leading case on the question of what is a sufficient entrustment for the purposes of section 20 of the Larceny Act. The case is cited in Kenny[33] for the proposition that " It is enough that [the accused] has obtained or assumed the ownership of another person's property in circumstances whereby he in fact becomes entrusted with it for a known purpose." The facts were that the accused formed a company to carry on the business of stock and share brokers. All the business of the company took place under his exclusive direction and control. He was charged under section 1 of the Larceny Act, 1901, with fraudulently converting:

" (a) a sum of £894 sent by one Miller for the purchase of £1,200 Consols;

(b) certain shares sent by one Ranking for sale, with instructions to invest the proceeds in other shares;

(c) a sum of £311 sent by Ranking to purchase shares; and

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[31] (1920) 15 Cr.App.R. 104. On the other hand, in *R.* v. *Bottomley* (1922) 16 Cr.App.R. 188 it was argued that the words, " received any property for or on account of any other person," should be construed in the same way as the similar words in s. 17 (1) (*b*) of the Act with the result that they would be inapplicable to a receipt of property from the person on whose account it was received. The court rejected this submission, saying: " We must look at the actual words used in this subsection and give them their natural interpretation . . . we can see no reason why we should put any limited construction on these words."

[32] [1915] 2 K.B. 683.

[33] p. 317.

(d) a sum of £91 sent by one Barthrop for the purchase of £100 stock."

Grubb paid the "sum" sent by Miller into the company's banking account which was overdrawn and disposed of the "sums" sent by Ranking and Barthrop in an unspecified manner, but did not invest any of these "sums" as he had been instructed. The "shares sent by one Ranking" consisted of "the certificate and transfer of certain shares," and Grubb appears to have wrongfully disposed of these. The argument for the defence was that the property was not entrusted to or received by Grubb, but by the company. The court would have none of this. Lord Reading C.J., delivering the judgment of the court, said:

> "In the opinion of this court a person may be entrusted with property, or may receive it for or on account of another person, within the meaning of this section, notwithstanding that the property is not delivered to him directly by the owner and that in fact that the owner does not know of his existence and has no intention of entrusting the property to him. If the accused has obtained or assumed the control of the property of another person under circumstances whereby he *becomes* entrusted or whereby his receipt *becomes* a receipt for or on account of another person, and fraudulently converts it or the proceeds, then he has committed an offence within the section."

The question which must now be asked is, did Grubb, as is suggested in Kenny, "obtain or assume" the ownership of the property which he was charged with converting? It will be convenient to consider the position of the money and the shares separately. It appears that in the case of items (a) (c) and (d) Grubb was convicted of fraudulent conversion of *money*. Yet it seems extremely improbable that he was ever entrusted with any cash. It is true that the report says: "Miss Miller forwarded the *sum of* £894 2s. to the company"; "Ranking forwarded £311 6s. to the company" and "Barthrop . . . forwarded money to the company." As a practical matter it is surely safe to assume that none of these customers of the company forwarded such a large sum in cash, but that what Grubb in fact received was a cheque for the sum in question. However, the judgment speaks throughout as if Grubb was entrusted with the money itself so, in considering the case as a precedent, perhaps the only safe course is to discuss it on the footing (a) that Grubb received cheques, and (b) that he received cash.

If Grubb received cheques from the company's customers nothing could be clearer than that he did not thereby become the owner of any money. As Lord Goddard C.J. pointed out in *R.* v. *Davenport* [34]:

> "Although one talks about people having money in a bank, it should be understood that the only person who has money in a bank is a banker. If I pay money into my bank either by paying cash or a cheque, that money at once becomes the money of the banker. The relationship between banker and customer is that of debtor and creditor. . . . The customer has a chose in action, that is to say, a right to expect that the banker will honour his cheque."

If it had appeared that Grubb had converted the cheques into money then it might have been argued that, having been entrusted with the cheques, he was equally entrusted with the proceeds of them. But that argument is not open so far as any cheque sent by Miller is concerned, since Grubb used it to pay off the company's overdraft and put its account into credit. If Miller sent a cheque, what Grubb actually did was to cause her bank account to be debited to the extent of £894 2s. for a purpose other than that which she had authorised. What he did with the sums sent by Ranking and Barthrop does not appear. It is certain, then, that, if the customers sent cheques, Grubb never became the owner of cash amounting to £894 2s. with which he was held to have been entrusted by Miller.

It seems likely that what Grubb really converted was the cheques which were sent to him, which were treated by the court as the equivalent of money. If so, the question then is: did Grubb become the owner of the cheques? The answer must surely be, No. Whether property passes by delivery usually depends upon the intention of the deliverer. The cheques were sent, not to Grubb, but to the company. The customers did not know of his existence and had no intention of transferring any property whatsoever to him. It follows, therefore, that the cheques would become the property of the company, and Grubb in dealing with them was no more the owner of them than any clerk who, in the course of his employment, receives cheques in favour of his employer. It is submitted, therefore, that if the customers sent cheques Grubb did not become the owner either of the cheques or the money which they represented.

If, on the other hand, it is necessary to consider the case as one in which Grubb received cash from the customers then the question is simply: Does a director become the owner of money which he has received from the company's customers or clients for the company in the course of his duties as a director? The answer, surely, is again in the negative.

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[34] [1954] 1 W.L.R. 569, at p. 571.

A further point which deserves emphasis is that Grubb used the money (whether cash or cheque) sent by Miller for the company's purposes in reducing its overdraft, and never even purported to act as personal owner of it. So far as this sum, at least, was concerned, he acted only as the company's agent dealing for the company's benefit with property entrusted to the company.

Finally, there is the question of the shares. Did Grubb become the owner of the shares? Unless he transferred them into his own name, and there is no evidence that he did, so it must be presumed that he did not, he plainly never became the owner. He may have had power to pass the ownership, but only because he was exercising, as the company's agent, a power which had been given to the company. In this sense a shop-assistant selling his employer's goods has power to pass the property in them. This case, then, is no authority for the proposition that only an owner can commit fraudulent conversion. On the contrary, however the case is approached, it is submitted that it is necessary to conclude that Grubb was not the owner of the property of the fraudulent conversion of which he was convicted. As the court said, he had "*assumed control* of the property of another person," and it was in assuming control that he became entrusted. But assuming control is a very different thing from becoming owner.

An alternative explanation of the case in the 11th edition of Russell[35] requires consideration. It is there stated: ". . . even if it could be accepted that it was the company which was guilty of the offence, yet it was through the accused man alone that the company acted, so that he would be equally guilty as a joint principal in the crime; and the ownership of the property which had been entrusted was either in the company or in the accused." It is now clear law that Grubb's acts could be attributed to the company, so it would be perfectly proper to hold, on the facts of the case, that the company was guilty as the principal in the first degree and that Grubb, incapable of being principal in the first degree because he was not "entrusted," was guilty as an aider and abettor. The case *could* have been so decided. But, with great respect, it seems clear that this was not the *ratio decidendi*. On the contrary, Lord Reading C.J. seems to have thought that a corporation could not be guilty of fraudulent conversion.[36] That this is almost certainly wrong, in the light of later decisions,[37] is irrelevant to the present discussion. It was Grubb who was held to be entrusted; and Grubb was not the owner of the property.

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[35] pp. 1266 *et seq.*

[36] pp. 689–690.

Grubb was followed by the Court of Criminal Appeal in *Cuffin*,[38] where the facts were somewhat different. The government food controller had taken over all imported meat and given it out to nominated firms for sale on commission. Cuffin was a director of one of those firms, Nevanas, Ltd. The court found that it was an " essential condition of the contract " that the proceeds of the sale of the meat were required to be kept in a separate account at the bank and not with the company's moneys. Cuffin used the proceeds of the sale of meat as assets of the company and invested them in a commercial venture of the company which turned out to be a failure. It was held that there was evidence on which the jury could find that (and " it was almost inconceivable for the jury to have come to any other conclusion ") Cuffin, as the director controlling the finance of the company, was a person entrusted with the money. Yet quite plainly he was not the owner of the money. Indeed he never even purported to use it as his own, but simply employed it in the company's business. It may be that the money, being the proceeds of the sale of meat which was the property of the government, belonged to the government, or it may be that it was the property of Nevanas, Ltd.—it does not clearly appear on the facts which was the true state of affairs; but one thing, at least, is surely quite clear, and that is that Cuffin was *not* the owner of the money.

In *Morter*[39] the accused, the managing director of a company, was given two signed blank cheques to buy respectively a typewriter and a motor-car. He bought these things, but filled up each cheque with a figure greater than the purchase price and appropriated the surpluses. Once again it was argued that there was no entrusting and once again the conviction was sustained, following *Grubb*. Now there is authority[40] for saying that a cheque forged by an agent in his principal's name remains the principal's property, at least where the cheque form is the principal's and is signed by him. In that case it follows that the money which is received on the forged cheque equally belongs to the principal, and that the sums received by Morter were therefore the property of the company.

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[37] *D.P.P.* v. *Kent and Sussex Contractors* [1944] K.B. 146; *R.* v. *I.C.R. Haulage Co. Ltd.* [1944] K.B. 551. See Welsh, " The Criminal Liability of Corporations " (1946) 62 L.Q.R. 345, 365.

[38] (1922) 27 Cox C.C. 293.

[39] (1927) 20 Cr.App.R. 53.

[40] *R.* v. *Davenport* (1954) 38 Cr.App.R. 37.

Assuming that Grubb, Cuffin and Morter were not the owners of the property converted, it does not follow that they could have been convicted of any other crimes, or that the duplication of criminal liability which Mr. Turner seeks to avoid would follow. It is improbable (though not impossible) that any one of them could have been convicted of larceny as a servant or embezzlement, simply because, being directors, they were probably not servants[41]; and it is not easy to see how they could be said to be bailees. If they could not be convicted of fraudulent conversion because they were not owners there might be a serious gap in the law. The limitation suggested by Mr. Turner might, therefore, have unfortunate practical results.

(*To be concluded.*)

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[41] Whether, and in what circumstances, a director can be a servant seems to be rather obscure. In *Hutton* v. *West Cork Ry. Co.* (1883) 23 Ch.D. 654, 672, Bowen L.J. said, " A director is not a servant. He is a person who is doing business for the company, but not upon ordinary terms." In *Moriarty* v. *Regent's Garage Company* [1921] 1 K.B. 423, 431, Lush J. said, " It is true to say that a director is not a servant of any master . . . a director cannot be described as servant of the company or of anyone." On the other hand, in *R.* v. *Stuart* [1894] 1 Q.B.D. 310 it was held that a director and shareholder of a company, whose duties under an agreement with the company included the collection of moneys due to the company, could be convicted of embezzlement. Lord Coleridge C.J. said, " The prisoner here filled two capacities. He was a director and also a servant of the company of which he was a member . . . It does not follow that because a person is a director he cannot be employed in the capacity of a servant," The view that a director is capable of being a servant seems to be an entirely reasonable one.

Should Magistrates Have Power to Send to Borstal?

THE "PROS" AND "CONS"

By ALEC SAMUELS, B.A.
Barrister-at-Law, Lecturer in Law, University of Southampton

A proposal which has been considered from time to time[1] is whether magistrates should have power to send an offender direct to borstal, instead of being able merely to commit to quarter sessions with a view to a sentence of borstal training.[2]

Arguments in favour of the proposal

There is often considerable delay between the time when the offender is committed to quarter sessions and his appearance there, and so long as there is only one remand centre available this waiting period has to be spent in prison—and everyone is agreed that the young offender should be kept out of prison wherever possible. He may have been remanded in custody in prison for a report even before the magistrates committed him to quarter sessions; and quarter sessions may not sentence him to an institutional sentence anyway. This problem is likely to be accentuated now the minimum qualifying age for borstal is reduced from 16 to 15.[3]

Quarter sessions frequently has no more information on the offender than was available to the magistrates, who have had the additional advantage of seeing him at close quarters during the original hearing to determine his guilt. It is always desirable that the court before which an offender is found guilty should also be responsible for imposing sentence. Many magistrates, particularly those serving on juvenile court panels, have a deeper understanding and wider experience of dealing with young offenders than the recorder or legally qualified chairman at quarter sessions. It is rare for quarter sessions to have before it an offender of 16, let alone 15. Magistrates may only commit to quarter sessions if they are satisfied having regard to the offender's character and previous conduct and the circumstances of the offence that it is expedient for his reformation and the prevention of crime that he should undergo a period of training in a borstal institution,[4] and in future borstal may only be imposed on an offender under 17 if the court is of opinion that no other method of dealing with him is appropriate.[5] Nearly always the report of the Prison Commissioners contains a fairly specific indication of the offender's suitability or otherwise for borstal training, and the court should not normally send an offender to borstal who is considered unsuitable by the Prison Commissioners.[6] In practice, quarter sessions sends approximately 80 per cent. of committed offenders to borstal, thereby endorsing the view of the magistrates.

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[1] The Report of the Secretary of State's Advisory Council on the Treatment of Offenders, November 1960 (Cmnd. 1213), p. 22, para. 64; the Report of the Departmental Committee on Children and Young Persons (Ingleby Committee) October 1960 (Cmnd. 1191), p. 105, para. 353; House of Commons Standing Committee B Criminal Justice Bill, cols. 77–90, December 6, 1960; House of Lords Committee Criminal Justice Bill, cols. 405–411, May 15, 1961.

[2] Magistrates' Courts Act, 1952, s. 28.

[3] Criminal Justice Act, 1961, s. 1 (1).

Although the basic principle is that magistrates should not be able to deprive a person of his liberty for more than six months, they can at present send an offender to an approved school[7] where he may stay for up to three years. Hitherto, magistrates have had power to send absconders from approved schools to borstal,[8] a power now replaced by a general power to remove a person not less than 15 from approved school to borstal when satisfied that his continued detention in an approved school would be ineffective for the purposes of his own reformation or would be detrimental to the training or welfare of other persons and that it is in his interests that he should receive training in a borstal institution.[9] Also, the period of borstal training is reduced from three to two years.[10]

Alternatively, the power to send direct to borstal could be limited to offenders of 15 and 16 only, *i.e.*, those normally convicted in juvenile courts; or magistrates could be given the option, either to send direct or commit to quarter sessions. Where two offenders, aged 15 and 17 respectively, were both convicted of a joint enterprise, the magistrates could either sentence the younger to borstal and commit the older to quarter sessions, or, in the exercise of their discretion, commit both to quarter sessions with a view to borstal training.

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[4] Magistrates' Courts Act, 1952, s. 28 (1).

[5] Criminal Justice Act, 1961, s. 1 (2) proviso.

[6] *R.* v. *Tarbottom* (1941) 28 Cr.App.R. 92; *R.* v. *Murray* [1951] 1 K.B. 391, (1951) 34 Cr.App.R. 203; *R.* v. *Shepherd* (1951) 34 Cr.App.R. 236; but see *R.* v. *Taylor* (1957) Crim.L.R. 159, C.C.A.

[7] Children and Young Persons Act, 1933, s. 57.

[8] Criminal Justice Act, 1948, s. 72 (1) (*b*).

[9] Criminal Justice Act, 1961, s. 16. The Criminal Justice Act, 1948, s. 72, is repealed: Criminal Justice Act, 1961, Fifth Schedule.

[10] Criminal Justice Act, 1961, s. 11 (1).

At present an offender sentenced to borstal training may always appeal with leave against sentence to the Court of Criminal Appeal. If magistrates could send direct to borstal it could be provided that the offender should have two opportunities for appeal, to quarter sessions and the Court of Criminal Appeal, or one appeal to either of those courts, or one appeal direct to the Court of Criminal Appeal.

Arguments against the proposal

Magistrates should be limited to depriving a person of his liberty for a maximum of six months. The power to send an offender to an approved school is not a fair analogy to a power to send to borstal, because an approved school is essentially an educational institution, not radically different from any other boarding school, whereas a borstal institution is fundamentally different. Committal to quarter sessions does mean that two courts have to consider the offender's suitability for borstal training; and this may be a very desirable safeguard in the anxious case of the particularly young offender of 15. In 20 per cent. of the committals with a view to borstal training quarter sessions does not in fact send to borstal despite the opinion of the magistrates. The mere fact of being sent from the informal atmosphere of a juvenile court to quarter sessions, where the offender comes more immediately into contact with the stern majesty of the law, may in itself act as a deterrent and bring him to realise the gravity of his situation. Juvenile panel magistrates not infrequently sit at quarter sessions. If magistrates could send offenders 15–16 but not 17–21 to borstal, there would be inescapable anomalies in dealing with two offenders of 15 and 17 found guilty of a joint enterprise. The danger of custody in prison will diminish as remand centres become available.

Finally, the deprivation of liberty involved in a borstal sentence is so serious that the right of appeal against sentence ought to lie to the Court of Criminal Appeal. To give an offender the opportunity to appeal twice is excessive; to appeal direct from the magistrates' court to the Court of Criminal Appeal is unknown in our system.

Legal Realism and the Jury

By J. A. ANDREWS, M.A., B.C.L.,

Barrister-at-Law, Lecturer in Law at the University of Birmingham

With few exceptions English writers on law are not legal realists, certainly not in the American sense. To a large degree their devotion to the theory or the ideal is shared by the Bench and is reflected in our law reports. Although a few weeks practice in the lower courts might convince the practitioner that things are not quite what the books would have them to be, nevertheless he tends to remain satisfied of the authority of the books and of the fact that there is generally a large degree of conformity between practice and the rule even if there appear to be occasional modifications for the sake of convenience.

The unanimous verdict

One of the best established rules in the criminal law books is the necessity for jury verdicts to be unanimous.[1] This is one of the cornerstones of British justice; though in truth it is contrary to human nature to suppose that twelve people will in fact agree on a particular point on all occasions. Indeed, one of the mysteries of our system of trial by jury is the fact that there are few cases of retrial because of the failure of juries to agree on a verdict. Can it be that twelve reasonable men become so reasonable that they are always *ad idem* on their subject? More probably it is boredom, tiredness, hunger, discomfort and many other factors which produce this unanimous agreement. It is exceedingly difficult to stick up for one's own ideas for three or four hours when one is in a minority of one or two and everybody is becoming very uncomfortable.

There is a great deal to be said for our system of trial by jury and one would not like to see it replaced by another system. On the other hand it should not be idealised and even the law recognises that juries are fallible and allows appeals from verdicts which are contrary to the weight of evidence.

Theoretically, on the basis of the unanimity rule, a verdict of guilty implies that each of the twelve members of the jury is satisfied beyond reasonable doubt of the accused's guilt. Similarly a verdict of not guilty implies that none of the jury is satisfied on the burden of proof of the accused's guilt. Should any of the twelve be on different sides then the jury is in a state of disagreement and if this persists there will be nothing for it but to order a retrial.

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[1] This rule is described as " a classic piece of conservatism " by Sir Patrick Devlin, *Trial by Jury*, at p. 49. He quotes Hallam as describing the rule as " that preposterous relic of barbarism."

It is not possible to make a precise survey of what goes on behind the door of the jury room because traditionally jurymen do not talk about their decision and how they reached it.[2] The probability is that in a fair number of cases the jury are unanimous from the first and any delay in their return to court is based upon a desire to avoid indecent haste. Apart from these cases the jury might find themselves with one or two dissenters from a general agreement or with no general agreement. In these cases they attempt to talk themselves into a degree of unanimity. In such cases the longer they talk, and they might talk for hours, the more tired they get and the greater becomes the resignation of the weaker so that ultimately they have a good chance of reaching a verdict.[3] In theory and probably in practice it will be the more reasonable view which will prevail.

Methods of reaching a decision

Anyone who has sat on a committee or a board of directors will know that there are a number of ways in which a decision can be reached. They fall roughly into four groups:

(1) In a few cases the members are all agreed from the first.
(2) In others there may be some dissenters who can be persuaded by reason.
(3) In other cases the few dissenters can be persuaded to swallow their discontent. Outwardly there might appear to be unanimity, but this is only because the would be dissenters have been talked into a state of acquiescence.
(4) Finally it may not be possible to persuade the dissenters to acquiese passively. In this case the decision can only be reached by a majority and it is forced on the dissenters.[4]

Now in theory, jury decisions are reached by the first two methods, *i.e.*, unanimity which is either shared at the beginning or arrived at by the exercise of reason and powers of persuasion.

In practice, jury decisions may well be reached by any of the four methods and in other less justifiable ways. In *Vaise* v. *Delaval*[5] evidence was held inadmissible of the fact that a previous jury decision had been reached by drawing lots. There is a well established rule of evidence that jurymen are not allowed to give evidence in a subsequent case to impeach a previous verdict in which they had joined.[6] It is perhaps as well because some of this evidence is calculated to undermine one's faith in the jury. In *R.* v. *Thomas*[7] evidence by two Welsh jurors that their knowledge of English had not been sufficient for them to comprehend a previous trial in which they had given their verdict was inadmissible.[8]

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[2] See Devlin, *Trial by Jury*, pp. 46 *et seq.*

[3] There is an interesting historical discussion of the application of physical pressures to encourage unanimity in Devlin, *op. cit.*, at pp. 50 *et seq.*

[4] There is sometimes a fifth method where the pertinacity of a minority may persuade the majority to their view. This is really a variation of the second or third methods with the minority taking the place of the majority.

Reverting to the four methods mentioned above it may be noticed that, although in theory the difference between (2) and (3) is considerable, in practice this is not so. A dissenter will probably give in with such an expression as " All right, go ahead then,'" or " I won't stand in your way." In these cases the decision is reached under (3) and is unopposed but not unanimous, but it could be argued that the committe-man intends to join in the collective decision and therefore it is unanimous. It is properly termed *nemine contradicente.*

The directions in Walhein and Mills

In practice, jury decisions are frequently made by the third method and in at least one case the Court of Criminal Appeal has sanctioned it. The case is *R.* v. *Walhein.*[9] In this case the court approved the following direction given to the jury:

> " You are a body of twelve men. Each of you has taken an oath to return a true verdict according to the evidence, but, of course, you have a duty not only as individuals, but collectively. No one must be false to that oath, but in order to return a collective verdict, the verdict of you all, there must necessarily be argument, and a certain amount of give and take and adjustment of views within the scope of the oath you have taken, and it makes for great public inconvenience and expense if jurors cannot agree owing to the unwillingness of one of their number to listen to the arguments of the rest. Having said that, I can say no more. If you disagree in your verdict in relation to one or other of these men, you must say so."[10]

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[5] (1785) 1 T.R. 11.

[6] See Phipson, *The Law of Evidence*, 9th ed., pp. 199, 200, and cases quoted therein.

[7] [1933] 2 K.B. 489; 24 Cr.App.R. 91. *Cf.* the view of Lord Atkin in *Ras Behari Lal* v. *The King-Emperor* (1933) 150 L.T. 3.

[8] See also *Nesbitt* v. *Parrett* (1902) 18 T.L.R. 510; *Jackson* v. *Williamson* (1788) 2 T.R. 281; *Ellis* v. *Deheer* [1922] 2 K.B. 113; *R.* v. *Ketteridge* [1915] 1 K.B. 467; *R.* v. *Melik* (1915) 11 Cr.App.R. 100; and *R.* v. *Brown* (1907) 7 N.S.W. State R. 296.

[9] (1952) 36 Cr.App.R. 167.

[10] *Ibid.*, at p. 168. In considering and approving this direction, Lord Goddard

This direction was given on the return of the jury into court to intimate to the judge that they were finding difficulty in arriving at a verdict.

The Court of Criminal Appeal fully approved this direction. The reference to "grave inconvenience and expense" was no threat, but merely pointed out to them the desirability of reaching agreement.

In upholding such a direction they purported to follow *R.* v. *Klein*[11] and distinguished *R.* v. *Mills*.[12] In this latter case the words used were much stronger:

> "It is of the utmost importance that a jury should come to a conclusion one way or other other at the end of a trial, because it is burdensome upon all concerned, including the accused, because it only means this, that, unless you do, the matter has got to be tried all over again; therefore you see the importance and necessity of coming to a conclusion one way or the other. Where you have got one or two, a small minority, in the jury who are thinking perhaps differently from the others, it is quite consistent with their oaths as jurymen that they should, after hearing what the others had got to say, come to the conclusion that they themselves might be wrong, and it would be consistent with the discharge of their duty and with their oaths under those circumstances, if they thought they were wrong, to accept the view of the majority and come to the conclusion that the majority might be right, and in that way you come to a conclusion in which you all agree by the exchange

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C.J. said: "In our opinion, that was a perfectly satisfactory direction. Jurors often have to be reminded that the case may be one in which some of them may start by taking one view and then, finding that the others are against them, may talk the matter over, subordinate their views to those of the majority and concur in the verdict. That is the only way in which juries can arrive at verdicts.

[11] (1932) 23 Cr.App.R. 185 (where the case was reported on another point). The summing-up of Finlay J. is referred to in *R.* v. *Mills* (1939) 27 Cr.App.R. 80, at p. 81, and approved. He directed the jury as follows: "In the first place, I desire to point out to you how vitally important it is that you should agree. I am not prepared yet to release you, because the consequences—the enormous expenditure of public money in this case, the consequences to the public and to every member of the public—are so grave that it is a matter of most vital importance that you should agree, and I must ask you to make another effort to agree. The other matter which I should like to say a word on is simply this, that with a view to agreeing there must inevitably be some give and take. I would exhort any member or members of the Jury who may be disposed to differ from their comrades, to consider the matter carefully, to weigh what is said to them, to remember, if they are a small minority—I do not know—to remember that they may be wrong, and while I would not for one moment suggest to a single member of the Jury to be false to his oath, I would most strongly urge upon all of you and upon each individual among you the extreme importance from the point of view of the Prisoner and from the point of view of the public and from every point of view, of agreeing." This direction is now very generally used. See Devlin, *op. cit.*, p. 52, and *Brain* v. *Minister of Pensions* [1947] K.B. 625 and *R.* v. *Creasey* (1953) 37 Cr.App.R. 179.

[12] [1939] 2 K.B. 90; 27 Cr.App.R. 80.

> of view, and perhaps a man in the minority might say: 'Well, I may be wrong.' That is quite consistent with the discharge of your duty. I must ask you to reconsider this matter and go back to your room, and, when you come to a conclusion, I will come back into court and take your decision, so that you may be released. *I cannot release you until you have come to a conclusion, and therefore I have got to ask you to retire again and consider the matter in the light of what I have said to you.*" [13]

The Court of Criminal Appeal thought it conceivable that the tenor of the words might have conveyed to the jury that it was not merely desirable but absolutely necessary for them to agree and that therefore the minority should give in. If the verdict were reached in this way it would be comparable to the fourth method mentioned above.

Some of the words used in Lord Hewart's judgment appear to go further than this at first sight:

> "A loose, vague acquiescence for the sake of avoiding delay and trouble would be not only indefensible but actually wrong and a violation of the juror's oath." [14]

But what Lord Hewart is criticising is not acquiescence as such but irresponsible acquiescence, which is certainly contrary to the juror's oath.[15]

The direction in Davey

The problem has recently arisen in *R.* v. *Davey* [16] and the Court of Criminal Appeal have laid considerable stress on the desire for unanimity. In this case the direction given by the commissioner was extremely complicated and, for this reason alone, unsatisfactory. The appeal was allowed on this point.

The direction given was as follows:

> "Sometimes in the past judges used to tell the juries that they have to be unanimous, but I always say—and it is true—you all have to agree before you can find anybody guilty, and there is no reason I know of why any judge should worry about that, from my experience, because whereas in lots of your own affairs, on committees, you do not always agree, nevertheless those of you who have experience of board meetings may find that again and again agreement is reached and no vote is taken, and hardly ever is a vote taken at a board meeting, and juries seriously realising what

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[13] [1939] 2 K.B. 90; 27 Cr.App.R. 80, at p. 81.

[14] [1939] 2 K.B. 90, at p. 93.

[15] The form of oath at present in use for felonies and misdemeanours is: "I swear by Almighty God (*or*, I do solemnly, sincerely, and truly declare and affirm) that I will faithfully try the several issues joined between our Sovereign Lady the Queen and the prisoner (*or* prisoners) at the Bar and give a true verdict according to the evidence."

[16] [1960] 1 W.L.R. 1287; [1961] Crim.L.R. 185.

> they are doing are united by a passion for the right verdict, a passion for stern or real justice, if you like, and the result I should think is that in ninety-nine cases out of one hundred there is not a disagreement at all, but solidarity and sense." [17]

The Court of Criminal Appeal described this direction as "ill-expressed, in some respects contradictory and extremely difficult to understand." [18] Perhaps the lapse is a little more understandable if we remember that it came after a hearing lasting more than two months and at the end of a summing-up lasting four days.

The Court of Criminal Appeal emphasised the desire for unanimity and stressed the frequency with which judges referred to the rule of unanimity in their summing up. In so far as the commissioner's summing-up contained a hint that the jury could lawfully reach a verdict which was not unanimous it erred from the proper rule. Further, the homely analogy of the committee or board of directors was unfortunate, since by emphasising the analogy the jurors might overlook their peculiar and very important duties as members of a jury.

A realistic view

To the extent that this homely analogy might have suggested to the jury that they need give no more consideration to their verdict than was given to the ordinary routine affairs of a committee it was unfortunate. But the Court of Criminal Appeal are surely overstating things if they are implying that jury decisions are peculiar and quite unique when compared with committee and director decisions. If there is a considerable difference in kind then it is doubtful if we are justified in selecting our juries in the way we do. If their task is so specialised, their duty so unique and important, then "jurymanship" must needs become a career with training and experience being all important and our present methods of selection should be scrapped. It is suggested that it would have been entirely proper if the trial judge had in the course of his direction equated their function with that of a committee or board of directors *considering an equally vital question.*

The fact is that a jury is supposedly a group of reasonable and ordinary people and they will decide the case in a reasonable and ordinary manner. If the dissenters do not think a point is worth quibbling over they will not argue. This does not mean the verdict is unanimous. The idea of jurymen arguing pertinaciously and refusing to compromise for convenience, to save time and money, and relieve boredom is unrealistic except possibly in the most serious offences. In many ways it is not only realistic but undesirable. If they did observe the rules strictly the time they would take to reach their decisions would be lengthened enormously and the number of retrials would greatly increase.

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[17] [1960] 1 W.L.R. 1287, p. 1291.

[18] *Ibid.*, at p. 1291.

The necessity for giving the " orthodox " direction on unanimity can be justified on the ground that any other direction might encourage the jury to reach an unconsidered decision. In the majority of cases the orthodox direction works well, but it breaks down in those cases where those dissenting from the majority are unconvertible. In these cases we are forced to rely on human weakness and their desire to go home. If their spirit does not break the jury will return to court for guidance. At this point the trial judge can either reiterate the orthodox requirement of unanimity or point out that they are required only to produce a collective verdict. This allows scope for acquiescence and does not require conviction on the part of any individual. It is this stressing of the collective verdict which was upheld and approved in *R.* v. *Walhein.*

R. v. *Davey* re-emphasises the individual responsibility and disapproves most strongly of any attempt to suggest a solution by acquiescence in a collective decision. One is tempted to say that realism and the law take different paths in the judgment of the Court of Criminal Appeal in *R.* v. *Davey.*

Finally, it might be interesting to compare the direction given in *R.* v. Davey with one given by Salter J. in 1914 in *R.* v. *Quartermaine* [19]:

> " I always think that when a criminal trial ends in a disagreement of the jury, it is a very unfortunate result; it casts no credit on anybody concerned, and the public time is occupied and public money is spent without effect. Unless you feel it is quite hopeless that you can possibly agree, I would be glad if you would try again. The only observation I would make is that, of course the prosecution must prove their case, and . . . if a substantial number take one view, as a rule it is expedient that the others should subordinate their views to the majority. I should be very sorry if this trial ended without result. Would you retire for a little further time? I will wait here and see if you can arrive at a verdict." [20]

The jury returned a verdict of manslaughter and Quartermaine appealed. Sankey J. giving the judgment of the Court of Criminal Appeal dismissed the application on the ground that the direction did not mean that the jury were to return a majority verdict.

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[19] (1919) 14 Cr.App.R. 109.

[20] *Ibid.*, at p. 110.

Artificial Insemination and Adultery in a recent Italian trial

By Giulio Battaglini
Ordinary Professor at the University of Bari

Summary

1. Whether artificial insemination can constitute the offence of adultery—the proceeding of November 1958 before the Praetor of Padua.

2. Conjugal fidelity as the interest prejudiced by adultery. Why, notwithstanding the importance of the interests injured, somewhat light penalties are prescribed by the Penal Code.

3. The distinction drawn in the Code between the infidelity of the wife and that of the husband, the latter being regarded as an offence only in the case of continuing cohabitation, is based on the nature of the matter. It does not therefore form a case of unconstitutionality within the meaning of article 29 of the Constitution.

4. The "essential fact" of the offence of adultery. The current opinion, based on the authority of Manzini and on traditional ideas (Carrara, Puccioni, etc.), limits the essential fact of the offence to carnal union. In our opinion, certain acts other than carnal union must also be considered adulterous offences. Court practice, by regarding libidinous acts as also coming within the offence of article 559 of the Penal Code, is likewise moving towards a wider interpretation. No exception can be made in respect of artificial insemination unknown to the husband: the so-called "artificial adultery," if the idea and the intention of the law are well borne in mind (the protection of conjugal fidelity and of marital order), is on the same level as "natural adultery." Article 12 of the Preliminary Provisions.

5. Subsequent court cases: judgment of the Tribunal of Padua, appeal to the Court of Cassation.

1. The facts of the recent case

The question whether fertilisation artificially procured by a woman, unknown to her husband, can constitute the offence of adultery has only recently arisen in Italy.

This occurred in connection with proceedings which took place before the Praetor of Padua, on November 6 and 7, 1958, ample and various reports of which soon appeared in the press.

The case concerned the following facts.

One Carlo Faedda, a retired Carabinieri officer, had lodged a complaint for adultery (in Italy the public prosecution takes place, for many offences, only in the case of a previous private complaint) against his wife Carla Casarotti—from whom he had been living apart by mutual consent since the beginning of 1956—on the grounds that she had given birth to a daughter on May 26, 1957. The accused defended herself by asserting that she had become pregnant as a result of a scientific experiment made by a Milanese gynaecologist. She declared, however, that she had given the " Professor " the undertaking not to reveal his name. He did not, therefore, appear in the proceedings. The Public Attorney demanded a conviction for adultery, but the Praetor decided the case by an acquittal on the ground of insufficiency of proof. Appeals were lodged both by the Public Attorney and the plaintiff.

The Public Attorney spoke with sympathy of the " humane personality " of Carla Casarotti, who, after learning that the marriage was barren through no fault of hers, had resorted, in order to have a child, to the *modern discoveries of science*, instead of to the sinful compromise of another " human relationship." The Public Attorney spoke strongly, however, of the pusillanimity of the Milanese gynaecologist who refused to appear as a witness, and he ended by declaring that, although in the case of Carla Casarotti there had been no natural union, she *had to be considered, nevertheless, as equally an adulteress, since she had, by the scientific experiment, violated matrimonial fidelity*. He therefore requested the Praetor that the accused, although with all extenuating circumstances, should be held guilty of the offence of adultery and, therefore, " be condemned to twenty days' imprisonment, on probation and without the conviction being entered in the Certificate of Conduct." [1]

2. Reasons for the comparatively light penalties

Adultery was at one time treated with great severity in all countries; it is sufficient to recall that Anne Boleyn went to the block for this offence. The modern leniency of the penal laws begins with the French Code of 1810, which followed that of 1791. and in which the violation of marital fidelity no longer even appeared in the list of punishable acts. In Czarist Russia (see article 1545 of the Code of 1845), adultery was only proceeded against on a complaint by the husband or wife and entailed internment in a monastery or convent, or detention in a fortress from four to eight months. Under the Austrian Code of 1852, which is still in force (after more than a hundred years!), adultery, whether by the wife or by the husband, constitutes a simple *police offence*, entailing detention from one to six months (see § 502).

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[1] See the text of the judgment of the Praetor of Padua (*inter alia*) in *Giust. Pen.*, 1959, II, cols. 101 *et seq.*

Why such leniency? Is it perhaps that the interest prejudiced is of a slight nature?

No. The interest violated is anything but negligible. It concerns *conjugal fidelity* in the *sexual* and *genital* aspect: it is this which is protected under the penal law. Liszt rightly said: "There can be no doubt that, by placing marital fidelity under penal protection, we not only intend to safeguard mutual fidelity between husband and wife as provided by the Civil Code, but we also wish to safeguard *one of the pillars of our present private and public life*." [2] Our Carrara agrees with this, regarding the violation of the duty of marital fidelity as the juridical object of adultery, and declaring that such violation is "reprehensible both in the eyes of moral law and in the eyes of juridical law," but he does not consider that the husband's adultery could be made a penal offence by the legislator.[3] The view that, by the same token, only continuing cohabitation is of penal relevance was held by the Zanardelli Code of 1889 (art. 354) and by the Italian Code now in force (art. 560). As regards the case of the husband, see article 292 of the Tuscan Penal Code.[4]

Why, notwithstanding the considerable importance of the interest prejudiced, has the Code prescribed such trifling, wholly ridiculous penalties? The answer is that the legislator, while being convinced that marital fidelity (in the two aforesaid aspects) constitutes one of the foundations of our entire private and public life (since it is a guarantee of the *soundness of the family*, the primary basis of national society), nevertheless feels bound to take into consideration the fairly widespread view which finds in adultery "*the fruit of a weakness of the passions*" deserving of sympathy. We are of the opinion that the legislator certainly should take into account what he considers to be the views of the majority of the fellow-members of society (whether established by the Gallup method or not!), but that the Code cannot be drawn up wholly by the criteria of the "realistic" novel, since the Code must also be *a teacher of morals, for the good of the people whom it is intended to direct and to govern.* It must not be forgotten, moreover, that from time to time, betrayed husbands have taken the law into their own hands by killing their wives.[5]

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[2] Liszt, *Strafrechtliche Aufsätze und Vorträge* (Essays and Lectures on Penal Law), Vol. I, p. 40.

[3] See Carrara, *Programme*, §§ 1871 *et seq.*

[4] As regards my own view, see my *Penal Law, General Part* (3rd ed., Padua 1949), pp. 65, 166; and, further, *The Complaint* (Turin, 1958), p. 17.

3. The distinction between adultery by the wife and by the husband

The distinction which is found in the Code (for instance, in the Tuscan Code of 1853 and in the repealed Italian Code) between the infidelity of the wife and that of the husband, the latter being considered an offence only in the case of continuing cohabitation, can be justified.

It is justified by the argument that simple adultery by the husband cannot, either from the point of view of private life or from that of the public interest, be placed on the same level as simple adultery of the wife. It may be useful to recall the eloquent words of Carrara on this subject: " The husband, by reason of the infidelity of the wife, suffers a loss of personal dignity, is derided by those who are cognisant thereof, and runs the risk of maintaining children who are not his own, and the frost of suspicion makes him shy of the embraces of those children who, but a short while ago, were his delight; and the wrong suffered leaves in the wound a poison which may well trouble him throughout the rest of his life; in a word, the family ties are permanently weakened even if they are not actually broken; whence, also, it comes about that society (which has likewise a great interest in the stability of the family) may fear prejudice therefrom; and in any event, the injury to the husband is such and is so great that all others are justly alarmed to reflect that they in their turn might become the victims of similar offences through the act of their wives. It seems to me, therefore, that the generality of modern authors considers as eccentric the doctrine of those who would wish to see a physical penalty inflicted on all unfaithful husbands equal to that which is inflicted on the wife, and that practically all the best penal legislations are not concerned with the infidelity of the husband except in cases of continuing cohabitation, as we have seen above (§ 1869)."[6]

It is impossible to believe that the distinction between the infidelity of the wife and that of the husband, which the Penal Code of 1930 has retained in respect of the offence of adultery, must at present be considered to be contrary to the new Constitutional Charter of 1947. The difficulty cannot arise, in accordance with paragraph 2 of article 29 of the Constitution, which states: " Marriage is governed by the moral and legal equality of the husband and wife, within the limits laid down by law to safeguard the unity of the family."

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[5] Concerning the weakness of the law in force, see also, *inter alia,* Manzini, *Penal Law,* Vol. VII, No. 2766; Maggiore, *Penal Law,* Vol. II, Section II, pp. 643 *et seq.*

[6] Carrara, *Programme,* § 1877.

This embodies a fundamental principle which, however, permits of special regulations on the part of the law for special situations. Even if the law is silent, we cannot but recognise, as a requirement of natural reason, that the husband has a *disciplinary right* over the wife, since the family is a partnership which, like any other partnership, demands a hierarchic order and, therefore, the authority of a leader.[7]

As regards the right of a spouse to the body of the other spouse, the conjugal partnership is based on absolute equality between the spouses. That does not mean, however, that the violation of fidelity in the case of the wife and in that of the husband must be considered in the same way as regards the intervention of the penal courts. The distinction imposes itself by the very nature of the matter.

We do not, therefore, agree as to the *unconstitutional nature* of the regulations relating to the offence of adultery in the Code now in force mentioned by Professor Mortati in one of his numerous invaluable popular lectures on the wireless on the subject of Italian law and comparative constitutional law.

4. The "essential fact" of the offence of adultery

There does not seem to be any doubt that the essential juridical object of the offence of adultery is marital fidelity, in the sexual and genital aspect.

Once this point has been clarified, however, it remains to be discovered *what constitutes the essential fact* of adultery, since this is not defined by the Code. Carrara wrote: "As regards the *material act,* the essential criteria of adultery present special difficulties. Generally speaking, it is certain that for its consummation *true and genuine copulation in the natural manner* is required: so that kisses, caresses and even perverted love do not constitute adultery."[8] Similarly, Puccioni spoke of "violation of the marriage tie which is committed by either of the spouses *by copulation with a third person.*"[9]

From these illustrious names of the Tuscan school we pass to Manzini, the great treatise writer of our times, without the conception of the material fact of adultery changing in the least. Actually, we read in Manzini: "The law has not given a specific definition of this offence, having limited itself to making reference implicitly to the traditional definition, according to which adultery is the wilful violation of the matrimonial order recognised and regulated by the State and legally constituted in the particular case, committed by the voluntary carnal union of a married woman with a man other than her husband."[10] Furthermore, in the same No. 2767, Manzini also makes reference to artificial insemination and says: "Where there is no such union, there is no offence, even if the woman is *artificially fecundated* by the sperma of a man other than her husband."[11]

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[7] See Battaglini, *Penal Law*, as quoted above, p. 316; Bettiol, *Penal Law* (4th ed., 1958), pp. 247 *et seq.*; also other authors.

[8] Carrara, *Programme*, Vol. III (Lucca, 1866), § 1884.

[9] Puccioni, *Illustrated Tuscan Penal Code*, Vol. IV (Pistoia, 1857), Art. 291.

In my *Penal Law* I have expressed a different view.[12] I, indeed, consider that adultery may also be committed *by acts other than carnal intercourse,* which also constitute violations of marital fidelity, such as libidinous acts and artificial insemination.

In the Ministerial Report of the draft of 1887 (No. cxxxii) it is stated that "not only the most overt moral infidelities but *even the most depraved lascivious acts* are not punished and cannot be punished as adultery, unless they develop into cohabitation." Maggiore justly commented: "Therefore a husband, surprising his wife in the position of *fellatio* with an unwelcome guest, would have no option but to wish them continuation of the good work!"[13]

But the point of view as regards libidinous acts has been superseded.

See, for instance, the recent judgment of January 10, 1958, of the Second Penal Division of the Court of Cassation, which recognised that even simple lascivious acts committed by the wife with a person other than the husband are sufficient to constitute the offence of adultery.[14]

As regards artificial insemination, there has been some talk, on the occasion of the recent proceedings before the Praetor's Office of Padua (also under the usual big headlines of the daily press) of a "gap in legislation," which is in urgent need of being filled. A Bill was even submitted through the members of parliament Giuseppe Gonella and Clemente Manca by which insemination by an outside donor is considered an offence and penal sanctions are proposed against all parties concerned: the wife, the consenting husband, the physician and the donor.

In my view, *this is not a question of a gap, but a question of interpretation.* It must always be borne in mind that the law does not define the material act of adultery. Now, if adultery is considered to mean copulation in the natural way with a person other than the husband or wife, then it is impossible not also to regard as adultery the act of a woman who resorts to *seminatio intra vas* of the sperma of another man by means of a gynaecologist's syringe. The injuries to private and public interests is *equal* to that which our great masters a century ago saw in adultery committed by carnal union.[15]

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[10] Manzini, *Italian Penal Law*, Vol. VII (1951 ed.), No. 2767, p. 678.
[11] *Loc. cit.*, at p. 681.
[12] 3rd ed., as quoted above (Padua, 1949), pp. 65, 166, 492.
[13] *Penal Law*, Vol. II, Section II (Bologna, 1948), p. 647, n. 2.
[14] *Foro Penale*, 1958, col. 376; also in other reviews.

The words "*intention of the legislator*" which appear in Art. 12 of the Preliminary Provisions to the Civil Code must be understood in the sense of the *idea and will of the law*. The latter in fact, once it has been created, *becomes objectivised*. So much so that, even if it is found that the so-called legislator intended it to be applicable to certain cases only, this is not decisive: the law given is also applicable to all other cases coming within the idea and the will which appear to be contained in it.

I do not think therefore, that the introduction of a new law is required in order to enable us to consider artificial insemination as adultery. There is, in my opinion, no *gap in legislation* in this respect; the logical interpretation of the positive law is sufficient.

5. Subsequent proceedings

Further to the appeals lodged against the decision of the Praetor of Padua, an important judgment was subsequently given on February 16, 1959, by the Tribunal[16] of Padua, which laid down that "the artificial insemination of a married woman by sperma other than that of the husband constitutes adultery."[17]

The accused lodged a further appeal with the Court of Cassation.

In the meantime various authors have again intervened in the doctrinal debate. Particularly notable is the thorough examination of the question by Prof. Dr. S. Lener, a Jesuit Padre, who is a highly esteemed legal consultant.[18] Lener maintains that the fact discussed constitutes the offence of adultery.

The case was submitted to the Second Penal Division of the Court of Cassation, but the First President of the Court of Cassation, complying with an application of counsel defending Mrs. Casarotti (who declared that she waived the right under the amnesty referred to in a recent Decree of the President of the

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[15] See above, p. 768, n. 6, the extract from Carrara.

[16] The *Tribunal* is a Bench composed of learned judges (unlike the "Court of Assizes").

[17] See, *inter alia*, *Giust. Pen.*, 1959, II, cols. 740 *et seq.*

[18] See his article in *Civiltà Cattolica*, issue of June 6, 1959.

Republic), ordered that the question should be submitted for decision to the United Penal Divisions of the Court of Cassation.

Many months passed!

Finally, November 26, 1960 was set down for the hearing of the case by the United Divisions. The United Divisions have decided that the sentence of the Tribunal of Padua was not censorable, because the *artificial insemination constituted the crime of adultery* (in the given circumstances). Therefore, the power of the Court of Cassation remains limited to applying the *amnesty*; and this the United Divisions have done.

It is to be noted that the amnesty is a renunciation by the state of the right of punishment, *in the public interest*. In such a case the court cannot decide according to the individual interest: consequently an individual renunciation of the amnesty is not valid.

Case and Comment[*]

BAIL

Magistrate's discretion as to bail—whether dependent upon evidence

R. v. Guest, ex p. Commissioner of Metropolitan Police

High Court of Justice: Widgery J., Vacation judge in chambers: August 24, 1961.[1]

R. and others were charged with robbery with aggravation under section 23 of the Larceny Act, 1916. Next morning, at West London Magistrates' Court, the officer in charge of the case gave "evidence of arrest" which did not connect the accused with the actual offence charged and asked for a remand in custody and sought to put forward matters in support of his objections to the grant of bail.

The magistrate held that he could not remand in custody and, indeed, could not consider the matters sought to be put forward by the arresting officer unless he had heard some evidence to connect the accused with the charge.

Upon application for an order of mandamus to compel the magistrate to hear matters in objection to bail without hearing such evidence:

Held, that the matter was covered by sections 6 and 105 of the Magistrates' Courts Act, 1952, that the meaning of those sections was clear and unambiguous and that the exercise of the magistrate's discretion as to bail did not depend upon evidence and could, indeed, arise before any evidence at all had been given.

Application for mandamus granted.

[K. A. EDWARDS, Chief Clerk, West London Magistrates' Court.]

Commentary. The Magistrates' Courts Act, 1952, provides:

Section 6—(1) A magistrates' court may, before beginning to inquire into an offence as examining justices, or at any time during the inquiry, adjourn the hearing, and if it does so shall remand the accused.

Section 105—(1) Where a magistrates' court has power to remand any person, then, subject to any enactment modifying that power, the court may—

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[*] Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the defendants: B. J. Yahuda (instructed by Sampson & Co), D. H. Farquharson (instructed by M. Wernick), Miss N. S. Lethbridge and Miss J. Graham Hall (instructed by Messrs. Lincoln & Lincoln). For the Commissioner of Police: J. H. Buzzard (instructed by the Solicitor, Metropolitan Police).

(*a*) remand him in custody . . . or
(*b*) remand him on bail. . . .

The magistrate reasoned as follows: He was given a discretion which must be exercised judicially. To act judicially is to act upon sworn, admissible evidence and, in its absence, there was nothing upon which a discretion could be exercised.

The practice of taking "evidence of arrest" is one which, although it has never received statutory or judicial sanction, has come to be regarded in magistrates' courts as a *sine qua non* for a remand in custody. It is quite apparent from the judgment in the above case that not only is evidence connecting the accused with the crime not essential but that "evidence of arrest" of any sort is unnecessary before the question of bail in indictable cases is considered.

Had the magistrate's decision been upheld, the effect upon the police might have been considerable. The evidence upon which they rely to link the accused with the crime may well not readily be available on the day he first appears before the court and, in its absence, any application for bail, even in cases of murder, must have met with success.

EVIDENCE

Handwriting—genuineness of receipt—matter incorrectly left to jury

R. v. Tilley

Court of Criminal Appeal: Ashworth, Salmon and Winn JJ.: July 27, 1961: *The Times*, July 28, 1961.[2]

T., with another man, was convicted at quarter sessions of stealing a car. T. and the other man said in evidence that they had bought the car from a named man and had obtained a receipt (which they produced). At the trial both men had been asked to write out the wording of the receipt, apparently in order to see whether T. or the other man had himself written the original. The matter was not, however, pursued and the case for the prosecution was put on the basis that the men had primed themselves with the receipt, so as to be ready for questions, and it was not of great concern who had written it. However, during the course of an overnight adjournment, the exhibits were photographed and the trial judge, in summing up, invited the jury to form their own view as to the genuineness of the receipt and to consider points of similarity in the handwriting on the receipt and on the documents written by the two defendants. On appeal to the Court of Criminal Appeal:

Held, allowing the appeals, that this court endorsed the statement of principles by Salter J. in *R.* v. *Rickards* (1918) 13 Cr.App.R.

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[2] For the appellants: *Robin Simpson* (instructed by Messrs. Peters & Peters). For the Crown: *G. H. Rooke* (instructed by Mr. N. K. Cooper).

140, that a jury should not be left to decide the question of handwriting on their own. The trial judge should not have made comments on these documents without there having been a witness called to advise upon them. Accordingly, the course pursued by the trial judge was not a correct one and the appeals would be allowed. [H. P.]

Commentary. A witness may be competent as an expert on handwriting although that is not his profession: *R.* v. *Silverlock* [1894] 2 Q.B. 766, where it was held that a solicitor who had given considerable study and attention to handwriting was properly allowed to give evidence in a criminal case. But the witness's knowledge and experience must not be only that which he has gained in the particular case: *R.* v. *Rickards* (above). Though the court in *Rickards* stated that the case which they were following (*R.* v. *Harvey* (1869) 11 Cox 546) did not decide that expert evidence in such cases is necessary, that seems to be the practical effect of these decisions.

Sexual offence—corroboration

See R. *v*. JONES (No. 1), below, p. 778.

FALSE PRETENCES

Ingredients of offence not described to jury—misdirection

R. v. Stock

Court of Criminal Appeal: Ashworth, Salmon and Winn JJ.: July 27, 1961: *The Times*, July 28, 1961.[3]

S. was convicted at the Central Criminal Court of eight offences of obtaining money and credit by false pretences. On appeal to the Court of Criminal Appeal:

Held, that the appeal would be allowed on the ground that the issues had not been laid before the jury in a sufficiently clear form. The summing-up lacked a direction as to the essential features and ingredients of the offence of false pretences. The trial judge had said: "Do you think this man was engaged in a swindle?" and left the matter there. Further, the prosecution sought to prove that the appellant had taken part in a business whereby people were persuaded to part with money upon the representation "that the business was honest and genuine." This allegation might give rise to difficulty. There was a difference between a business which was not genuine and honest and one which, though honest, was conducted dishonestly. It was not easy to define what was meant by an "honest and genuine business" in terms that would be clear to a jury. Counsel for the prosecution had conceded that, if the business in this case was an honest and genuine one, but being run dishonestly, then the verdict would be not guilty. The jury, as directed, might have concluded that the appellant had been acting dishonestly in the running of the business, as distinct from the alleged false pretence. Because this distinction had not been made plain to the jury, this court did not think it right to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. [H. P.]

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[3] For the appellant: *Bernard Gillis, Q.C., L. J. Solley* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Mervyn Griffith-Jones, Michael Corkrey* (instructed by the Director of Public Prosecutions).

Commentary. It appears that there was a failure in this case to explain to the jury the nature of the crime of false pretences, which is a relatively narrow form of what can, comprehensively and popularly, be described as "swindling." To justify a conviction of false pretences, there must be proof of a representation of an existing fact which is false and known to be false, the representation must act on the mind of the victim so as to induce him to part with his property and there must be an intent to defraud. There are undoubtedly many cases where a jury would be reasonably satisfied that a business was dishonest and a swindle and yet not satisfied that these elements of the crime of false pretences were all present. The facts of *R.* v. *Dent* [1955] 2 Q.B. 590 and *R.* v. *Ingram* [1956] 2 Q.B. 424 are illustrations of how a business may be carried on dishonestly and as a swindle without affording grounds for a charge of false pretences. A representation that a business was being carried on when this was not so would, of course, be a sufficient false pretence.

HOMICIDE

Murder—provocation—issue not left to jury

R. v. Porritt

Court of Criminal Appeal: Ashworth, Salmon and Winn JJ.: July 26, 1961: *The Times*, July 27, 1961.[4]

P. was convicted at the Central Criminal Court of capital murder. The facts were that an evening of violence between P. and his family on the one hand and the C. family on the other culminated in an attack upon P.'s home. P.'s evidence was that he had seen his stepfather being held by two men, one of whom had a knife close to his throat; that he had pulled a gun from his pocket and pointed it at the man holding the knife; and that he fired and hit his stepfather. P. appealed to the Court of Criminal Appeal on the main ground that the jury ought to have been directed that a verdict of manslaughter was open to them on the ground of provocation.

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[4] For the appellant: *Victor Durand, Q.C., Richard Du Cann* (instructed by Messrs. Rees, Daultry & Co.). For the Crown: *Mervyn Griffith-Jones, Alastair Morton* (instructed by the Director of Public Prosecutions).

Held, that a verdict of manslaughter had not been sought by the defence at the trial, nor was such a verdict suggested by the Crown or judge. No reference had been made to manslaughter in the summing-up. P.'s defence had been that the shooting had been done in defence of a near relative and in defence of his home. However, although a particular issue was not raised by the defence, it was incumbent upon the judge, if the evidence justified it, to leave that issue to the jury; see *Bullard* v. *R.* [1957] Crim.L.R. 816, and section 3 of the Homicide Act, 1957. If provocation had been left to the jury in this case, they might have thought that the sight of his stepfather in imminent peril came as such a shock and P., at the culmination of a stormy evening, that he was no longer the master of his mind and shot on provocation. On that view the proper verdict would have been one of manslaughter. There was evidence which would have justified such a verdict and, accordingly, the verdict of murder would be set aside and a sentence of manslaughter substituted therefor. [H. P.]

Commentary. It is a complete defence to a charge of murder for the accused to show that he acted in the reasonable belief that his action was necessary to preserve the life of a near relative who was under an unlawful attack: *R.* v. *Rose* (1884) 15 Cox 540. This is a well-established extension of the defence of self-defence. Even where a killing was the outcome of a quarrel or fight, it was excusable, though not justifiable, at common law, if the killer had not begun but had taken part in the fight, or, if having begun it, he endeavoured to decline any further struggle and retreated but, being closely pressed, killed his antagonist to avoid himself being killed or maimed. This was the doctrine of chance-medley which, since the abolition of the distinction between justifiable and excusable homicides by the Offences against the Person Act, 1828, s. 10 (now the Offences against the Person Act, 1861, s. 7), has no place in our law: *R.* v. *Semini* [1949] 1 K.B. 405. A case which would formerly have come within the doctrine ought now to result simply in a verdict of not guilty. It is not clear whether this defence was raised at the trial or, if it was, why it was rejected.

The fact that the circumstances did not justify a defence of self-defence (or, more precisely, defence of another) does not rule out a defence of provocation: *Bullard* v. *R.* (above). And it was laid down by the House of Lords in *Mancini* v. *D. P. P.* [1942] A.C. 1 that, although the only defence raised at the trial in that case was self-defence, " it was undoubtedly the duty of the judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it." *Cf.*, also, *R.* v. *Hopper* [1915] 2 K.B. 431.

The court in the present case seems to have taken a liberal view of what might constitute provocation. The Australian courts might have mitigated the offence to manslaughter by a slightly different route, under a recently developed doctrine described by Professor Norval Morris in [1960] Crim.L.R. 468: "if the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon but the person taking action acts beyond the necessity of the occasion and kills the offender the crime is manslaughter—not murder." No attempt has yet been made to rely on such a defence in this country; but Morris's description of it as "important contribution to British criminal jurisprudence" is, with respect, fully justified; and it is hoped that the Australian authorities will not indefinitely escape the attention of defending counsel.

RAPE

Evidence—corroboration—whether misdirection

R. v. Jones (No. 1)

Court of Criminal Appeal: Ashworth, Salmon and Winn JJ.: July 24, 1961: *The Times*, July 25, 1961.[5]

J. was convicted at the Central Criminal Court of rape committed on a girl of eleven years of age. On the night of the offence the girl in question left a girl guides meeting at 9.30 p.m. She arrived home at 1.30 a.m. After twenty-five minutes a policewoman arrived, to whom the girl gave a description of the man who had raped her. J. appealed to the Court of Criminal Appeal on the grounds (i) that the trial judge had wrongly told the jury by implication that the description given to the policewoman was corroboration of the girl's evidence; and (ii) that the trial judge had failed to tell the jury that the description given to the policewoman was admissible merely to show consistency of the girl's conduct and was not evidence of the accuracy of her complaint.

Held, dismissing the appeal, that no one who had heard the summing-up could have been left in any doubt that it was the jury's duty to look for evidence apart from what the girl had said either on oath or to the policewoman. It was not necessary for the judge in summing-up to point out individual pieces of evidence showing corroboration; it was sufficient to point out that there was such evidence. In the present case the trial judge had contrasted the independent evidence with the girl's evidence and had emphasised that the jury should consider very carefully whether there was evidence, independent of the girl's evidence, which corroborated her in the sense of strengthening and supporting what she had said implicating the appellant. As to the second point, it was true that the trial judge had not directed the jury that the complaint could only be of value on the question of the girl's credibility. However, this court was not prepared to say that this omission, which was of little or no weight, amounted to a misdirection. In any event, no miscarriage of justice had occurred. [H. P.]

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[5] For the appellant: *Norman Brodrick, Q.C., Michael Hoare* (instructed by Messrs. Owen White & Catlin). For the Crown: *Mervyn Griffith-Jones, John Mathew* (instructed by the Director of Public Prosecutions).

Commentary. It is a well-established rule of practice that corroboration of the evidence of the prosecutrix is required in charges of rape and other sexual offences. The terms of a complaint promptly made by the victim of a sexual offence may be admissible in evidence (a) to prove the consistency of the conduct of the prosecutrix with the story told by her in the witness box and (b) as being inconsistent with her consent to that of which she complains: *R.* v. *Lillyman* [1896] 2 Q.B. 167; *R.* v. *Osborne* [1905] 1 K.B. 551. It has always been held, however, that the complaint is not evidence of the facts stated in it and it cannot, therefore, constitute corroboration of the complainant's evidence. Moreover, a witness cannot corroborate himself; *R.* v. *Christie* [1914] A.C. 545, 548. "You do not corroborate the truth of a statement by saying that it was made before—repetition is not corroboration," *per* Sir John Simon, Attorney-General, *arguendo*.

In *R.* v. *Tragen* [1956] Crim.L.R. 332 the court held that the function of the judge was to point out the evidence capable in law of being regarded as corroboration; and that it was then for the jury to say whether or not this evidence amounted to corroboration. This seems inconsistent with, and preferable to, the approach adopted in the present case where it was said that it was not necessary to point to individual pieces of evidence showing corroboration; it was sufficient to point out that there was "abundant evidence." It is thought that this is unsatisfactory in two respects: (1) it is for the jury to say whether they believe the evidence and they may disbelieve some or all of the "abundant evidence"; (2) the jury may very reasonably act on the assumption that a particular piece of evidence is corroboration when —as in the case of a complaint—the law is that it is incapable of being such.

SENTENCE

Corrective training—length of sentence

H.M. Advocate v. Craig

High Court of Justiciary: Lord Justice-Clerk (Thomson): 1961 S.L.T. 327.[6]

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[6] For the appellant: *Adamson* (instructed by Ian A. C. Whyte, S.S.C.). For H.M. Advocate: *Law*, A.-D. (instructed by Lionel I. Gordon, Crown Agent).

C. was sentenced to twenty-one months' imprisonment for nine charges of housebreaking and theft. The court had previously ordered a report on C.'s suitability for corrective training in accordance with section 21 (5) of the Criminal Justice (Scotland) Act, 1949. The bulk of the Lord Justice-Clerk's judgment was concerned to modify his observations in *H.M. Advocate* v. *McErlane,* 1953 J.C. 12; S.L.T. 47. That case had laid down that corrective training required a substantial period to achieve its objects and accordingly the statutory minimum sentence would only be useful in special circumstances. In the present judgment it was noted that since, on the principle of *McErlane,* corrective training involved a very considerable deprivation of liberty, courts had been unwilling to award corrective training to offenders who would not have received a normal prison sentence of more than 18–24 months. However, experience since *McErlane* had shown that good results can be obtained in a shorter period and the curriculum of training has now been modified to comprehend the minimum sentence of two years less remission. This change should enlarge the scope of corrective training by increasing the numbers of those who are likely to benefit from it, particularly as it justifies the sending of less hardened offenders to corrective training at a time when there is a good chance that the remedial measures will be effective.

Commentary. These observations are the Scottish counterpart of the Practice Direction of February 20, 1961 [1961] Crim.L.R. 249; 1 W.L.R. 463; as *H.M.A.* v. *McErlane* paralleled *R.* v. *Grant,* 34 Cr.App.R. 2, 230. The matter seems a good instance of the liaison between the two countries and between the prison and administration and the courts in laying down penal policy. Despite the correspondence between the law and administration of the two countries, corrective training has been much more rare in Scotland than in England. A calculation from official statistics shows that in 1959 of the daily average prison population in Scotland less than 0·5 per cent. was undergoing corrective training compared with 4·1 per cent. in England. This difference not only reflects the longer sentences served in England but is also probably due in some measure to the fact that Sheriff Courts handle most potential corrective trainees. The normal maximum competent prison sentence of these courts is two years and they were perhaps unwilling to exceed this period for corrective training although they were empowered to do so (Criminal Justice (Scotland) Act, 1959, s. 1, as interpreted in *Mullen* v. *H.M.A.,* 1954 S.L.T. 122). The observations in this case ought therefore to increase the Scottish figures substantially.

The Scottish Home Department had added to the numbers of trainees proper with specially chosen prisoners. It remains to be seen what the effect of an increase of those qualified to training *de jure* will have on the scheme.

[Report and Commentary by STUART O. KERMACK.]

Acts and Orders[*]

Consumer Protection

CONSUMER PROTECTION ACT, 1961 (9 & 10 Eliz. 2, c. 40) (9d.). Operative August 19, 1961, makes provision for the protection of consumers. Section 1 provides that the Secretary of State may by Regulations impose such requirements as to the composition or contents, design, construction, finish or packaging of goods, or as to other matters relating to goods, as he thinks expedient to reduce the risk of death or personal injury, and also as to the marking of such goods with or the accompaniment of such goods by warning notices. Section 2 makes it an offence for any person to sell or to possess for sale any goods in respect of which Regulations under section 1 have been made, unless the requirements of those Regulations have been complied with. Section 2 (3) excepts certain classes of persons from these requirements. Penalties for contraventions are set out in section 3 of the Act.

Criminal Procedure

A large number of the provisions of the Criminal Justice Act, 1961, specified in the First Schedule to the Order, were brought into operation on October 2, 1961. The provisions brought into force are sections 8 (fines for young offenders); 9 (breach of probation, etc.); 10 (attendance at attendance centres); 11 (term of detention and supervision under sentence of borstal training); 12 (return to borstal on reconviction); 14 (release and supervision of persons detained in or released from approved schools); 15 (temporary removal from approved school); 16 and 17 (removal to borstal of person detained in approved school); 18 and 19 (management of approved schools); 21 (repeal of provisions requiring certain discharged prisoners to notify their addresses); 22 (penalties for assisting escape from prison and other places of detention); 23 (Prison Rules and discharge of prisoners); 24 (transfer of functions of Prison Commissioners); 26, 27, 28 (transfer of prisoners to serve sentence, or for trial or temporary transfers); 29 (removal of prisoners for other judicial purposes); 30 (prisoners unlawfully at large); 31 (subsequent sentence in case of persons transferred or removed under Part III of Act); 32 (extension to United Kingdom, Channel Islands and Isle of Man of certain enactments relating to supervision and recall); 33 (signing orders under Part III); 35 (legal custody); 36 (general provisions as to orders); 37 (Prison Commissioners' reports); 38 and 39 (interpretation); 40 (Northern Ireland; 41 (except subsection 4) (minor amendments and repeals); 42 (application of Act to Scotland and Northern Ireland); 43 (expenses payable out of moneys provided by Parliament); Second Schedule (supervision of persons released from approved schools); certain parts of the Fourth and Fifth Schedules (minor amendments and repeals). CRIMINAL JUSTICE ACT, 1961 (COMMENCEMENT No. 1) ORDER, 1961 (S.I. No. 1672) (6d.).

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[*] Prepared by F. Maurice Drake, Barrister-at-Law.

Exchange Control

The list of persons authorised by the Treasury under the Exchange Control Act, 1947, to act as dealers in gold and foreign currencies and as depositaries for the purpose of the deposit of securities is further amended. Operative August 30, 1961. EXCHANGE CONTROL (AUTHORISED DEALERS AND DEPOSITARIES) (AMENDMENT) (No. 3) ORDER, 1961 (S.I. No. 1641) (2d.).

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947.

Factories

Regulations made under the provisions of the Factories Acts, 1937 and 1948, for the protection of persons employed, impose requirements designed to promote the safe conduct of building operations and works of engineering construction. In the case of building operations the Regulations replace similar requirements in the Building (Safety, Health and Welfare) Regulations, 1948. Regulation 57 makes it an offence to sell, let or hire prime movers and other machines which are not securely fenced as required by Regulation 43. Operative March 1, 1962. CONSTRUCTION (GENERAL PROVISIONS) REGULATIONS, 1961 (S.I. No. 1580) (9d.).

For penalty for contraventions, see sections 17 and 131 of the Factories Act, 1937.

Regulations made under the provisions of the Factories Acts, 1937, 1948 and 1959, for the protection of persons employed impose requirements as to the construction, use and examination of lifting appliances, lifting gear and lifting tackle used for the purposes of building operations and works of engineering construction. In the case of building operations the Regulations replace similar requirements in the Bulding (Safety, Health and Welfare) Regulations, 1948. Operative March 1, 1962. CONSTRUCTION (LIFTING OPERATIONS) REGULATIONS, 1961 (S.I. No. 1581) (1s.).

For penalties for contraventions, see section 131 of the Factories Act, 1937.

For the purposes of a large number of Regulations dealing with various activities in factories it is now provided that the expression "factory" shall include the railway running sheds which were included within the definition of that expression by section 25 of the Factories Act, 1959. Operative October 1, 1961. RAILWAY RUNNING SHEDS (NO. 2) REGULATIONS, 1961 (S.I. No. 1768) (3d.).

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 1591 (Richmond) (3d.); 1592 (Wandsworth) (3d.); 1617 (Croydon) (2d.).

The following Order has been made imposing a 30 m.p.h. speed limit on certain roads: S.I. No. 1728 (Edmonton) (3d.).

The following Order has been made imposing a 40 m.p.h. speed limit on a road: S.I. No. 1717 (Woolwich) (3d.).

The following Order has been made removing the 40 m.p.h. speed limit from a road: S.I. No. 1729 (Edmonton) (3d.).

The following Orders have been made prohibiting waiting: S.I. Nos. 1629 (Leatherhead) (2d.); 1757 (Northfleet) (3d.).

The following Orders have been made prohibiting cycling on footpaths: S.I. Nos. 1618 (Orpington, Chislehurst and Sidcup) (3d.); 1756 (Chislehurst and Sidcup) (3d.).

The following Orders have been made respecting parking places with parking meters: S.I. Nos. 1593 (Finsbury) (1s. 3d.); 1676 (Westminster) (1s. 3d.); 1692 (Holborn) (Amendment Order) (6d.).

LONDON TRAFFIC (PARKING PLACES) CONSOLIDATION (AMENDMENT) REGULATIONS, 1961 (S.I. No. 1782) (4d.), further amend the principal Regulations (S.I. 1957, No. 1937) by appointing new parking places, revoking previous places, altering the limits or descriptions of others, and altering the class of vehicles permitted to use certain other such places. Places affected are situated in Deptford, Greenwich, Lewisham, Acton, Epsom and Ewell, Erith, Gravesend, Hendon, Hertford, Heston and Isleworth, Wanstead and Woodford, Hornchurch, Northfleet, Sevenoaks, Acton, West Ham, Ealing, Leyton, Ruislip and Northwood, Beaconsfield and Dorking. Operative October 2, 1961.

Police

The Police (Promotion) Regulations, 1956 (S.I. 1956, No. 1532) are amended. The 1956 Regulations require a constable to have completed certain police service before he is eligible to sit for the examination for promotion to sergeant, and exclude from the definition of "service" any service below the age of twenty years. The new Regulations enable service as a constable below the age of twenty years to be counted for this purpose. Operative September 25, 1961. POLICE (PROMOTION) REGULATIONS, 1961 (S.I. No. 1793) (2d.).

Road Traffic

The provisions of section 3 and the First Schedule to the Road Traffic Act, 1956 (now section 67 and Schedule Eight to the Road Traffic Act, 1960), under which vehicles may be stopped on a road and tested as to the condition of certain parts, were brought into operation on September 11, 1961. ROAD TRAFFIC ACT, 1956 (COMMENCEMENT NO. 12) ORDER, 1961 (S.I. No. 1586) (2d.).

Regulation 106 of the principal Regulations (S.I. 1955 No. 482) is amended in that (1) the Regulation, which provided for the testing and inspection of any brakes, silencers, or steering gear fitted to a motor-vehicle or trailer, now provides in addition for the testing and inspection of the tyres, lighting equipment and reflectors of motor-vehicles and trailers, and (2) the Regulation now provides for testing and inspection to take place only at the premises where the vehicles are. It no longer provides for testing and inspection on a road, provision for which is now made by section 67 of the Road Traffic Act, 1960 (see above). Operative September 11, 1961. MOTOR VEHICLES (CONSTRUCTION AND USE) (AMENDMENT) (NO. 3) REGULATIONS, 1961 (S.I. No. 1643) (3d.).

For penalties for contraventions see section 239 of the Road Traffic Act, 1960.

Salmon and Freshwater Fisheries

Provision is made for the Cumberland River Board, with the approval of the Minister of Agriculture, Fisheries and Food, to erect and work fixed engines (which would otherwise be illegal instruments) for catching salmon and migratory trout for artificial propagation and scientific purposes. Operative August 31, 1961. CUMBERLAND RIVER BOARD (FIXED ENGINES) ORDER, 1961 (S.I. No. 1700) (3d.).

Scotland

These Regulations prescribe the particulars of bookmakers' permits granted under the Betting and Gaming Act, 1960, which are required under section 5 (1) of the Betting Levy Act, 1961, to be sent to the Horserace Betting Levy Board established under that Act. Operative September 11, 1961. BETTING LEVY (PARTICULARS OF BOOKMAKERS' PERMITS) (SCOTLAND) REGULATIONS, 1961 (S.I. No. 1709) (3d.).

See also under **Criminal Procedure,** above, p. 781.

Practical Problems

All questions for consideration should be addressed to " The Editor, The Criminal Law Review, 11 *New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

87. *Validity of a conviction where a brother impersonated the accused—appropriate charges against brother and accused.*

A man, A, is stopped whilst driving a motor-vehicle and required to produce his driving licence. He elects to do this later and subsequently a police officer calls at his address in this connection. B, the brother of A, is interviewed by the officer, to whom he claims that he is in fact A, the man who was stopped. This deceit is not detected and summonses are issued against A, for offences being committed at the time he was spoken to by the police. Both brothers attend court and, fearing detection by the officer who interviewed B, rather than the one who stopped A, B answers the charges in the name of A, pleads " Guilty " and is fined and disqualified from driving.

A week later, B is seen driving and reported for "driving whilst disqualified," at which point he reveals the facts as given above, the whole of which were in the full knowledge of A.

In the event of a conviction of B for personation A at court under section 34 of the Forgery Act, 1861, is either A. or B. still disqualified without any further action being taken? [D.E.]

ANSWER

There appears to be a singular lack of authority on this matter but my opinion is as follows.

(1) A has committed the offences but has not appeared before the court in answer to the charges against him. You do not

say whether the summonses were in fact served on A or B. However, in any event I do not think that A could be said to have been convicted or sentenced because (a) if the summonses had not been served on him the magistrates would have had no power to proceed with the case in his absence (*R.* v. *Smith* (1875) L.R. 10 Q.B. 604; 39 J.P. 613) and (*b*), if the summonses had been properly served on him the magistrates could not have convicted him in his absence without hearing the sworn evidence as on a "not guilty" plea. Thus, if the summonses were in fact served on A the magistrates could now be asked to issue a warrant for his apprehension. If not, it will now be necessary to issue fresh process against A.

(2) So far as B is concerned I think that the irregularity was such as to vitiate the entire proceedings and that B cannot be said to have been properly convicted or sentenced. The informations, being the documents forming the basis of the proceedings, are laid against A and not B and the facts of the cases themselves relate only to A.

I should add that I do not consider section 34 of the Forgery Act, 1861, to be appropriate for dealing with B's activities. It would surely be better to charge A and B with conspiracy to defeat the course of public justice. [K.C.C.]

Letters to the Editor

The Criminal and His Car

Sir,

I read with interest Mr. Andrews' letter on this subject, but must say that I feel that it is based on a fallacious assumption, namely, that disqualification will deter the criminal from driving.

The weapon of disqualification will, surely, only be effective if it can actually prevent the travelling criminal from using his car, or for that matter any car at the very outset of his expedition. If this cannot be done, what is the value as a deterrent of the penalty for driving whilst disqualified when the much greater penalty for burglary or robbery or whatever ultimate offence the travelling criminal has in mind, has failed to deter him in the first place? Furthermore, what is the likelihood of such a disqualified driver being detected whilst driving? If the car is properly licensed and driven in such a manner as not to attract the attention of the police, there is little reason why the disqualified driver should be stopped once he has left his own immediate neighbourhood. What is there to prevent his car from being licensed and insured in the name of his wife or his friend, and thus obtaining the outward appearance of a car which is being driven in compliance with the full requirements of the law?

Quite apart from the possibility of a criminal using his own car there is another aspect which arises when he uses someone else's without consent. One is inclined to wonder how many of the crimes committed by the motorised criminal are, in fact, committed with cars stolen or unlawfully taken away. If the car is taken without consent, it is possible that a crime may be committed many miles away and the car abandoned yet many more miles away before the offence has been reported to the police (or at least before information of the offence has been circulated over a wide area). How many persons who take or drive away cars are caught in possession?—surely, the disqualified driver's chances of driving undetected (in his own or another's car) are at least as great. It is not without significance that one of the two new branches set up by the Metropolitan Police in 1960 was the Stolen Motor Vehicles Investigation Branch.

I venture to suggest that the practical value of disqualifying criminals from driving would be so small as to render the provision ineffective and would submit that present-day experience supports this view.

Those who are involved regularly in prosecutions can no doubt recall many occasions where motorised criminals are, in fact, disqualified drivers, often as a result of their previous failure to insure their cars. The fact that they are disqualified does not seem to deter these people from using cars to further their criminal expeditions, and it so often seems to happen that the offence of driving whilst disqualified only comes to light as a result of the detection of a more serious offence.

Although it is regrettable, disqualification would only seem to be of value against the "honest" motoring offender and not against the man who is liable for a long term of imprisonment, or even preventive detention, if he is caught.

Yours faithfully,

Peter Shaw.

Halifax, Yorks.

Scots Law regarding Confessions

Sir,

Once again an attempt has been made to elucidate one of the problems of Scots law. It has always intrigued me that the English judges have managed to produce rules for the guidance of the police with regard to statements from accused persons while the Scots judges find that this is impossible.

" Scots Advocate " is apparently bolder than the Lords Commissioners of Justiciary and is offering his neck for the chopper.

I would not raise any objection to his article had he refrained from attempting to summarise the main subject-matter. The summary, however, falls short in several respects which, I feel, make comment necessary.

The second item in the summary says: " Once suspicion has fallen upon a particular person further questioning by the police is not advised." But, in the fourth paragraph of the article the writer mentions examples of questioning which may take place. Not only *may* a police officer question an accused about the identity of his accomplices and the disposal of stolen goods, he *should* do so: and I would consider a constable negligent in his duty who failed to make such inquiries.

The third item in the summary reads: " Once a person is arrested and charged the task of the police in investigating the crime is complete. No further questions should be asked of the accused, who is entitled immediately to legal advice." The opening sentence will give rise to much derisory laughter from police officers. It is after the arrest that most of the investigation takes place. If the police waited until investigation was completed before making an arrest, I fear that the clumsy procedure of the Fugitive Offenders and Extradition Acts would have to be simplified. The suggestion that " no further questions should be asked " I have already dealt with. I cannot understand why " who is entitled immediately to legal advice " should be included in the same sentence. The police have always believed that a person is entitled to legal advice at any time and they are prepared to afford facilities for consultation with a solicitor if this is requested at any stage in a criminal investigation. Section 12 of the Summary Jurisdiction (Scotland) Act, 1956, is not considered to exclude earlier consultation with a solicitor.

Your contributor refers to the case of *Bell* (1945 J.C. 61) where Lord Cooper distinguished between a person:

(1) who has been charged with a crime and is in custody awaiting trial;
(2) who has been detained on suspicion; and
(3) who has not been detained or charged, against whom perhaps there may be no evidence whatever justifying detention or charge or even suspicion, but who is merely being questioned by

> the police in the exercise of their duties of investigating the commission of a crime.

I venture to suggest that the law would have been better understood if this third category had been less wide. Later in his judgment the learned judge again referred to "three types of cases" but on this occasion the third type was described as "the ordinary citizen whose duty it is to give assistance to the police and to answer any reasonable question which may be put to him when the police are still at the stage of exploring matters with a view to discovering by whom an alleged crime has been committed."

Between (a) the person "detained on suspicion" and (b) the person "against whom there may perhaps be no evidence whatever justifying detention," later described as the "ordinary citizen whose duty it is to give assistance to the police," there can be found persons who are extraordinary citizens in that they are well known to the police as criminals and persons against whom reasonable suspicion exists though this is not sufficiently strong to justify detaining them. If it was the intention of Lord Cooper in the *Bell* case to make a full review of the law regarding confessions he appears to have missed what I suggest is a group intervening between his types 2 and 3. If, on the other hand, Lord Cooper's review was complete then all persons who have not been arrested and charged or detained on suspicion fall into type 3, may be quesioned and thir answers used as evidence. I do not believe this to be the case. Once suspicion has fallen on a person any replies he makes to questions asked by the police will not be allowed as evidence. They may, of course, prove useful to the police in their further investigations.

Lord Cooper appeared to recognise this situation in his generalisations on the case of *Chalmers* (1954 J.C. 66). On page 78 he is reported as saying in reference to interrogation by the police "when the stage has been reached at which suspicion, *or more than suspicion,* has *in their view* centred on some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous and, if carried too far, *e.g.*, to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will *almost* certainly be excluded."

It is unfortunate that Lord Cooper inserted the words I have italicised. Lord Thomson in his supporting judgment was more precise when he said, "There does come a time, however, when a police officer carrying out his duty honestly and conscientiously, ought to be in a position to appreciate that the man whom he is in the process of questioning is under serious consideration as the perpetrator of the crime. Once that stage of suspicion is reached, the suspect is in the position that thereafter the only evidence admissible against him is his own voluntary statement." I would suggest that this is a better statement of the law than was Lord Cooper's.

It is interesting to note that in his judgment on *Chalmers* Lord Cooper beat a retreat from his judgment in *Bell.* Category 2, which he established in *Bell,* was neatly eliminated in the following words, "Much reference was made to a person 'detained under suspicion' an expression which has been used ambiguously in many of our decisions but the emphasis is on the suspicion and not on the detention. Putting aside the case of proper apprehension without a warrant of persons caught more or less redhanded, no person can be lawfully detained except after a charge has been made against him. . . ." Where now is the "clear distinction" between (1) a person who has been charged with the crime and is in custody awaiting trial, and (2) a person who has been detained on suspicion?

It seems that if "A Scots Advocate" is going to explain "Scots Law Regarding Confessions" he will have to go beyond the *Bell* case and the judges will have to be more explicit.

In his conclusion "A Scots Advocate" says, "These rules have been found to operate fairly well in practice."

This raises two questions:

(a) What rules? Are those the ones Lord Cooper found it was not possible to make? and

(b) Can the law be considered to operate fairly well when the crime per head of population in Scotland is so much greater than in England?

I am, Sir,
Your obedient servant,
W. A. RATCLIFFE,
Chief Superintendent.

Glasgow.

"A Scots Advocate" writes:

"The interesting points raised by the Chief Superintendent emphasise the difference of approach between that of the police officer who desires to have definite rules of procedure laid down in black and white, and that of the lawyer who tries to make the best of incomprehensive judicial dicta in the reported cases. My suggestion that "the rules," that is, of course, the rules of procedure so far as laid down in the cases, have worked fairly well in practice was in fact intended as a compliment to Scottish police practice. I have known many cases where an accused has sought to recant in the witness box a statement made earlier to police officers. In every case in my experience the judge has rejected the defence contention that the police had acted improperly in obtaining or taking the statement."

Books and Periodicals

Book review:

Guilty But Insane. Four Trials for Murder. By G. W. Keeton. London: Macdonald & Co. (Publishers), Ltd. 202 pp. (including index). 21s. net.

There can be no doubt that this work by the versatile and prolific Professor Keeton will be a source of profit and enjoyment to lawyers and laymen alike. The pattern of *Trial for Treason* is followed, namely, a recapitulation of four famous trials with an ostensibly common theme. In 1800 James Hadfield fired at George III in a theatre. The narrative of the background of the characters in the trial, the superb examination of the prisoner's sister-in-law Mary Gore, and the surprisingly modern analysis and discussion of insanity by the incomparable Erskine in defence "has a vivid intensity of a story projected upon the screen." Thence the reader is taken through the cases till M'Naughten, in which Cockburn on behalf of the prisoner so successfully propounded the doctrine of partial insanity which was implicitly accepted by the judges in the M'Naughten Rules and has for long been recognised in modern medicine to be quite untenable.

From 1843 to 1952 is a long jump. Indeed, whereas the first half of the book exhibits continuity and the richness of contemporary advocacy, the two final cases of *Straffen* and *Podola* seem to be but a tenuous step in the line of argument. The Straffen story is simply yet powerfully told. Although the case vividly emphasised the narrow concept of insanity in the law, in retrospect this aspect of the case is now of little importance since obviously Straffen would now be found guilty of manslaughter on the grounds of diminished responsibility. But we are now faced with the problem of distinguishing between insanity and diminished responsibility; a significantly large number of murder trials now consist of a contest over this issue, the Crown resisting a plea of diminished responsibility by adducing evidence of insanity. Professor Keeton rightly criticises the deplorable state of affairs in which the prisoner cannot appeal against a verdict of insanity, nor of unfitness to plead. The account of the *Podola* case is controversial. It is not correct to state that only the defence may raise the issue of fitness to plead. Would it really save time and expense if a preliminary point were to be taken to appeal before the trial of the substantive issue?

This book is pervaded by an unmistakable quality of good writing in the descriptions of the trials, with a fine sense of controlled tension and climax in the passages of cross-examination. A certain ambiguity in dealing with provocative legal issues might tend to irritate the lawyer; but it is always a delight to read Erskine, and all these *causes célèbres* have a remarkable interest.

ALEC SAMUELS.

Readers' digest:

Consumer Protection: The enforcement of consumer protection: 125 *Justice of the Peace* 583.

Forensic: Psychiatry and crime—truth drugs: 17 *The Magistrate* 125.

Jurisprudence: Sophistry and sin: 125 *Justice of the Peace* 553.

Jurisprudence: Public morals and the law: 125 *Justice of the Peace* 598.

Juveniles: Ingleby Report—criticism of new procedure: 17 *The Magistrate* 126.

Law Reform: Streatfeild Committee Report: Be bold: 105 *Solicitors' Journal* 772.

Penology: Getting to the roots of crime: 9 *Probation* 157.

Penology: The roots of crime: 58 *Law Society's Gazette* 615.

Police: Minor offences: 69 *Police Review* 696.

Police: The Municipal Corporations Act, 1882, and the police: 125 *Justice of the Peace* 554.

Practice and Procedure: Criminal court procedure in the U.S.S.R.: 9 *Probation* 161.

Practice and Procedure: Election or indictment: 125 *Justice of the Peace* 596.

Road Traffic: Motoring offences—burden of proof: 232 *Law Times* 144.

Scotland: Criminal law and practice in Scotland: 34 *Police Journal* 366.

Shipping: Load lines: 232 *Law Times* 173.

Statutes: The Suicide Act, 1961: 105 *Solicitors' Journal* 753.

Weights and Measures: " Measure " or " instrument " ?: 125 *Justice of the Peace* 570.

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1961

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THE
CRIMINAL LAW
REVIEW

December 1961

Murder statistics

The Home Office Research Unit's report on *Murder* offers a variety of numerical information (number of murders, types of victim and murderer, motives, and so on) " to give a perspective view of the subject over recent years." Broadly, the figures show that any increase in the incidence of murder in the last few years has been insignificant compared with the increase in crime as a whole, and that the increase is roughly divided proportionately between capital and non-capital murder. This seems to be evidence useful to the abolitionist cause, for it suggests that murderers have been unaffected by the distinctions drawn in the Homicide Act. This point seems strengthened by reference to the recent increases in the number of murders committed " in the course or furtherance of theft " (capital murder) and of murders involving several offenders. These two classes must overlap considerably; and the greater the overlap the less the apparent deterrent effect of the capital penalty.

Two points of interest concern sexual murders of children under sixteen. One is that such murders are very few (an average of 3·3 a year over six years): the publicity they receive perhaps accounts for one's surprise at the figures. The other point is that the dates of sexual murders of young girls lend some support to the theory that such murders tend to occur in series—a theory which, if true, possibly justifies further comment on press publicity.

The report is careful and illuminating as far as it goes, and it is in no carping spirit that we suggest that in two related respects it does not go far enough. First, one of the main questions which the report will be taken as answering is: how many people, in a given period, have demonstrated in action a murderous intent? But the answer to this question is incomplete without some computation of the number of *attempted* murders: there can be little significance, for the assessment of the incidence of a readiness to kill, in the fact that some attempts fail and some succeed.

Secondly, since an intent to cause grievous bodily harm is sufficient for malice aforethought, one would like to see, alongside the murder figures, the figures for the non-fatal " g. b. h. " cases. For every one (or at least, the more serious) of these is a potential murder case. If the figures for what one may call bad " g. b. h." are very much up in recent years, then it is only chance which permits one to say that the increase in murder is nothing to the general increase in crime. Alternatively, the report should ideally distinguish murders where an actual intent to kill was present from other murders. Alternatively again, if this objection to the adequacy of the report is thought to be badly taken, that conclusion may be regarded as an oblique comment on the existence of the intent to cause grievous bodily harm as a species of malice aforethought.

A committee on criminal appeals

It will cause no surprise if the committee set up by " Justice "[1] to consider the present system and procedure of criminal appeals as provided for by the Criminal Appeal Act, 1907, should reach the conclusion that legislation is called for on a number of matters.

Changes in the constitution or organisation of the Court of Criminal Appeal may be found desirable in view of the great flood of work in which the court has recently been immersed. Coping with this flood has kept busy an unprecedented number of judges of the Queen's Bench Division. Judicial time is at a premium these days. A system should if possible be found which would enable the appeal court to keep abreast of the dispatch of business in the courts of trial without overstraining the resources of the High Court bench or of its individual members.

The committee's terms of reference require consideration of the question whether the Court of Criminal Appeal has powers sufficient for the remedying of miscarriages of justice. Two problems offering themselves as obvious candidates for scrutiny under this head are whether the verdict of " guilty but insane " should be appealable and the desirability of retrials.

The court has recently affirmed that from the special verdict there can be no appeal.[2] An accused, whose defence of insanity is alternative to his contention that even if sane he did not commit murder, may be genuinely aggrieved by the decision that he was guilty of the act of murder charged. Further, the practice of trial judges in recent years has shown that a man may be found " guilty but insane " where he has contended for a finding of diminished responsibility or even, exceptionally, of not guilty. It is a serious deficiency in the system that the Court of Criminal Appeal is not competent to rule on the legal propriety of this result or on the circumstances in which it is permissible. Perhaps we shall have legislation to remedy this deficiency before the *Felstead* decision of 1914 is fifty years old.

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[1] British section of the International Commission of Jurists.

[2] *R.* v. *Duke* (1961) 105 S.J. 891. See p. 833, *post.*

Various opinions have lately been voiced, in debate both formal and informal, on the court's inability to order a new trial. The question is not an easy one. There is a conflict of aims—on the one hand to minimise the possibility of escaping conviction on a technicality, and on the other to set a limit to the process of prosecution. There is a conflict of attitudes—the desire for real justice is bedevilled, and yet oddly humanised, by a tendency to feel about criminal justice as about a game of cricket. It is the sort of situation which we shall presumably resolve in the end by a compromise, as by providing for retrials in situations at once limited and ill defined.

The dispatch of criminal business

The extent to which the Criminal Justice Administration Bill, together with promised non-statutory measures, reflects the Streatfield Committee's ingenious proposals [3] is a tribute to the way in which the Committee did its job. The Bill aims to improve the expedition and efficiency of criminal justice and to reduce the time spent awaiting trial and sentence at assizes and quarter sessions.

We are to have yet more High Court judges (the size of the bench has risen prodigiously of late). Circuit itineraries are to be reorganised—this is an administrative matter. Quarter sessions will sit whenever necessary and their organisation will be more flexible. There is to be increased trial jurisdiction both at quarter sessions and in the magistrates' courts. The " convenient court " procedure is to be available where the committal is for sentence as where it is for trial, and will be used as a matter of course where the trial would otherwise be delayed for more than eight weeks.

These and other changes will be public and formal. But the success of the reforms must depend to a great extent upon the less public operations of those whose business it is to organise the work of the criminal courts from session to session and from day to day. The spirit of this Bill is as important as its letter; the operation of the machine is as vital as its construction. At this time, while the minds of those whose arrange court business are being stimulated by the demand for smooth organisation and the avoidance of delay that the Bill contains, it may not be inopportune to draw attention to a reform of another type, but of a similar spirit, that is required in some courts.

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[3] *Report of the Interdepartmental Committee on the Business of the Criminal Courts* (Cmnd. 1289). See [1961] Crim.L.R. 209.

We refer to the need to respect the reasonable convenience of practitioners and, especially, members of the public—witnesses and accused persons on bail—who attend criminal trials. It too often happens that large numbers of persons are required to attend court on a day or at an hour when there is no reasonable chance that their case will be reached. "Not before 2" is too often an obvious understatement for "not before two days' time." No doubt the volume of work makes it necessary to provide in advance for the possibility that a long case or a full list may collapse. But judicial convenience and the dispatch of business are not the only considerations. They should be balanced more carefully than they often are against the proper demands of the public served by the courts and of those who practice in them.

Judicial appointments

Mr. Roger Fray Greenwood Ormrod, Q.C. has been appointed a Justice of the Supreme Court of Judicature and assigned to the Probate, Divorce and Admiralty Division of the High Court.

Mr. Justice Marshall has been transferred to the Queen's Bench Division of the High Court.

Mr. Francis John Watkin Williams, Q.C. has been appointed Chairman of Flint County Quarter Sessions.

Mr. Kenneth George Illtyd Jones has been appointed Deputy Chairman of Hereford County Quarter Sessions.

Mr. Richard William Vick has been appointed Deputy Chairman of West Kent Quarter Sessions.

Mr. Lyall Wilkes has been appointed Deputy Chairman of Durham County Quarter Sessions.

The Scope of Fraudulent Conversion—II

By J. C. Smith, M.A., LL.B.
Barrister-at-Law, Professor of Law in the University of Nottingham

Fraudulent conversion and embezzlement

The view that the same facts may ground liability for both of these crimes is supported by a comparison of *Morter* and *Davenport.* In the latter case, the accused, who was the secretary of a company, received blank cheques signed by two directors of the company which it was his duty to countersign and pay to those persons to whom the company wished to make payments. He disposed of three cheques by handing them to one Samuel made out to Samuel's bank, in return for cash and open cheques which the accused cashed. The Court of Criminal Appeal held that, as the money and cheques received from Samuel were the proceeds of his master's cheque, they were received for and on behalf of his master and he was guilty of embezzlement in applying them to his own use. Goddard L.C.J., delivering the judgment of the court, said:

> "The appellant got Samuel to cash his master's cheque, and he obtained cash in his hands, banknotes. It follows that that money, as it was the proceeds of his master's cheque, was received for and on behalf of his master and, therefore, he embezzled that money because he applied it to his own uses instead of handing it over."

It will be recalled that Morter behaved in a similar manner with the cheques which were entrusted to him. In both cases the cheques were forged, but that did not prevent the property in the proceeds vesting in the masters. If, then, Morter was a servant [1]—which, of course was not decided, being irrelevant on an indictment for fraudulent conversion—an indictment for embezzlement would also have lain against him. Embezzlement is a crime which can be committed only by a clerk or servant, but it is clear that the fact that the accused is a servant will not *preclude* his conviction for fraudulent conversion: *R.* v. *Solomons*,[2] where a taxi-driver was held both to be a servant for the purposes of the Falsification of Accounts Act, 1875, and to be guilty of fraudulent conversion under section 1 (1) (*b*) of the Larceny Act, 1901.

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[1] *Cf. R.* v. *Stuart*, p. 754, n. 41, above.

[2] (1909) 101 L.T. 496.

Fraudulent conversion and larceny by a servant

Here again there is no clear authority, but there are dicta which support the view that on the same facts an indictment will lie for either the felony or the misdemeanour. In *R.* v. *Williams,*[3] the Court of Criminal Appeal, in upholding the conviction of a sub-postmistress for larceny of the money of the Postmaster General said (Lord Goddard C.J.):

> "This case would have been far simpler if the prosecution had put forward, as they should have, that this was a case of fraudulent conversion, because difficulties may easily arise in the case of the theft of coins, which is the offence with which this case is concerned."

This leaves no doubt that the court thought that the same facts may, in some circumstances, support an indictment for either simple larceny or fraudulent conversion. Unfortunately the case is not a very clear authority on the point now under discussion, since there was no holding that—as, it is submitted, was the fact—the sub-postmistress was a servant[4]; but, in order to convict of larceny, the court must have thought that Williams was either (a) a bailee having possession of the notes and coins, or (b) a servant having custody of the notes and coins. Quite certainly the court did *not* proceed on the assumption that the sub-postmistress was the owner. If the dictum does not mean that fraudulent conversion and larceny by a servant may coincide, then it does mean that fraudulent conversion and larceny by a bailee may. In either event it supports the view that the same deed may be both fraudulent conversion and a felony under the Act.

Dicta in *Davenport* were less equivocal. There Lord Goddard said: "If the appellant had been charged with the fraudulent conversion of the cheques, there could have been no answer." Now these cheques, signed by two directors of the company, were received by the accused, in his capacity as secretary of the company, to be used in the company's business. The conclusion is inescapable that, far from owning the cheques, he did not even possess them but merely had them in his custody. In that case misappropriation of them plainly amounted to larceny by a servant under section 17 (1) (*a*); and the court thought that it also amounted to fraudulent conversion. Mr. Turner, who criticises this dictum,[5] assumes that the Lord Chief Justice had section 20 (1) (iv) in mind. There is nothing in the report to indicate that this was so and it may well be that he was thinking of section 20 (1) (ii) (above, p. 748). Indeed it seems to be too plain for argument that Davenport's conduct came within the words of the latter subsection. If his actions amounted to a crime under 20 (1) (ii) as well as larceny by a servant, why not 20 (1) (iv)?

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[3] [1953] 1 Q.B. 660; [1953] 2 W.L.R. 937.

[4] See "The Fraudulent Sub-Postmistress," [1955] Crim.L.R. 18.

Fraudulent conversion by an owner

ratio may be [illegible]

A view of the scope of fraudulent conversion which appears to be diametrically opposed to that stated in Russell was expressed by Lord Goddard C.J. in *Jones*.[6] The accused, a sign-painter, offered to paint a lady's house. He said that he needed money to buy paints and she advanced £3 to him for that purpose. He never did the work and presumably disposed of the £3 for his own benefit. In delivering the judgment of the Court of Criminal Appeal, quashing the accused's conviction for fraudulent conversion, Lord Goddard said:

> "There was no fiduciary relationship here. It cannot be said that the money remained the money of the persons who gave it to the appellant, and he could not therefore be guilty of fraudulently converting it to his own use. On the money being handed to the appellant, it was his money."

If the *ratio decidendi* is to be found in the last two sentences, it seems to be simply: Because he was made owner of the money, therefore he could not commit fraudulent conversion. But, as will appear from other cases to be examined, it is clear that an owner can be guilty of the crime; and it submitted, therefore, that it is necessary to take into account the first sentence: "There was no fiduciary relationship here." When money is handed by A to B so as to make B owner of the money, with an obligation to pay an equivalent sum, either to A or to C in the future, B, if he is not a trustee, is a debtor. Some of the *dicta* in the cases would lead one to suppose that a mere debtor can never be guilty of fraudulent conversion. In fact it seems however that an owner, who is not a trustee, can commit fraudulent conversion of property which he has acquired in a fiduciary capacity. The existence of a fiduciary relationship, such as parent and child, principal and agent, religious adviser and disciple, or solicitor and clerk, is important in several branches of the law. But it is clear that what is significant in fraudulent conversion is not the pre-existing relationship between the parties, but rather the terms on which the property is received. Thus, if a client made an ordinary loan to his solicitor, there could be no question, it is submitted, of the solicitor being guilty of fraudulent conversion of the sum in question. On the other hand, if a perfect stranger were to hand me a cheque for £100 on my undertaking to keep it in my bank account until he should need it, it would undoubtedly be the crime if I, having paid the cheque into my bank, were fraudulently to withdraw and spend all the money in my account. When the ownership in money is transferred it is suggested that the test is: Was the transferee permitted, under the terms of the contract, to use the money as he thought fit; or was he obliged to apply it in a particular way or to retain an equivalent sum, either in his possession or in a bank? Only in the latter event can the transferee commit fraudulent conversion. Thus it is clear that an ordinary borrower cannot fraudulently convert the sum borrowed. And similarly it is clear that a banker cannot commit fraudulent conversion of money deposited with him by a customer for "The money placed in the custody of a banker is, to all intents and purposes, the money of the banker to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it in jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is, of course, answerable for that amount, because he has contracted, having received the money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands." [7] With this may be contrasted Wills J.'s view in *Re Bellencontre* [8] of the meaning of the term "entrusted . . . for safe custody" under the Larceny Act, 1861, s. 76:

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[5] [1956] Crim.L.R. 736.

[6] (1948) 33 Cr.App.R. 11.

> "To hold, as has been suggested, that the section applied only to money which has been put into a bag and given to a man to keep in a drawer would be, to my mind, simply a *reductio ad absurdum*, because in the business of this and every other civilised country no such process as that ever takes place. . . . I cannot doubt that it is fully within the meaning of the Act, if the money is entrusted to him under circumstances which would make it his duty to pay it to a special account with a bank, or to keep it in any other reasonable way in which men of business ordinarily keep their money, so as to have, not the specific coins, the equivalents at call when demanded."

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[7] *Foley* v. *Hill* (1848) 2 H.L.C. 28; 9 E.R. 1002, *per* Cottenham L.C.

[8] [1891] 2 Q.B. 122 at p. 142.

see C + Smith 1502 (Bailee)

The suggested test is in conformity with the interpretation put upon *Hotine*,[9] in later cases. Hotine required persons entering into his employment to deposit sums of money as security for their honesty. In each case he promised to repay the money when the depositor left his service and in some cases he gave a promissory note payable at three months or on the depositor leaving his service. He failed to repay the deposits. The Common Serjeant, after consulting Phillimore J., held that this could not be fraudulent conversion, apparently on the ground that Hotine was not bound to retain either the money itself or an equivalent for it but was free to use it as he pleased. " He can pass the money into his bankers or do anything he likes with it . . . he can use it in his business, he is not bound to keep it all separate, he can mix it with his own as much as he likes." On Mathews (for the prosecution) saying " He must keep the equivalent to be in a position to return it," the Common Serjeant said, " Not necessarily . . . he is not bound to keep it, it is only a mere civil debt which may arise."

Hotine was distinguished in *Lord*.[10] The accused was employed by the prosecutors to collect debts and pay them over to the prosecutors less 5 per cent. He failed to account for some of the money which he had collected, and was indicted under the Larceny Act, 1901, for the fraudulent conversion of property " received for or on account of " the prosecutors. " It was contended for the prisoner," said Alverstone L.C.J., " that on the analogy of *Hotine* he was not guilty of an offence within this statute, but that he only became the debtor of the prosecutors for the money he had collected. In my opinion that proposition cannot be maintained. Without expressing any opinion on *Hotine*, it seems to me that in that case the defendant was entitled for the time being to use the money. In this case all that appears is that the prisoner was employed to collect money for the prosecutors upon commission." Now this passage *might* mean that Lord did not become a debtor because the money he collected became and remained the prosecutors' money so that he was a bailee. It is submitted, however, that, in the light of the facts of the case, that is not the proper interpretation. It seems more likely that Lord became the owner of the money which he collected, but was under a duty to account for all that he received less 5 per cent. In that case he was a debtor. It is submitted therefore that what the passage means is that he was a debtor with a duty to keep in existence a fund equivalent to the amount of his debts. Unlike Hotine, Lord was not free to use the money which he owned.

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[9] (1904) 68 *Justice of the Peace* 143.

[10] (1905) 69 *Justice of the Peace* 467.

Again in *Smith* [11] where an employer said that he required a deposit as security for honesty which, he said, he would deposit at Barclays Bank and would return at the end of three months, it was held to be a fraudulent conversion to lose the money in a speculation. Smith was entrusted with property in order that he might retain it in safe custody. Lord Hewart C.J. said of *Hotine*:

> "If the Common Serjeant intended to lay down in general terms that where money is paid by way of deposit as security for the honesty of the person so paying it, the person to whom it is paid is entitled to use it as his own, then the judgment cannot be supported."

The creation of the fiduciary duty

Is it essential that the fiduciary duty should arise out of an arrangement between the person paying the money and the accused? Or will it suffice that the accused's duty to keep the fund in existence arises out of his relationship with a third party? In spite of one decision to the contrary, it is clear that the latter is the correct rule. The case to the contrary is *South*.[12] In that case the accused who had been trading under the name of "W. Coleman & Co." entered into an agreement with the prosecutor giving him the right to trade under that name. It was agreed that South would obtain orders from customers on behalf of the prosecutor and that he would get in all moneys due and pay them over to the prosecutor in full and without any deductions on Wednesday and Saturday in every week. South received certain sums from customers which he failed to hand over. He was charged with converting money received "for or on account of" the prosecutor. The Common Serjeant held that there was no case to go to the jury, apparently on the ground that, because the customers knew the accused as "W. Coleman & Co." and did not know that the money which they paid to him ought to be handed on to the prosecutor, there was no entrusting. He said:

> "The charge is that he received the money for the prosecutor, and I think the real effect of this agreement is that he, as between himself and those who paid it, received it absolutely for himself. They knew nothing of the prosecutor. The prisoner might make any bargain with them; the whole contract was between the customers and him, and as to the

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[11] [1924] 2 K.B. 194.

[12] (1907) 71 *Justice of the Peace* 191.

> clause that he is to pay the whole of the money to the prosecutor, the legal effect of it is, not that he received the money for the prosecutor, but that there is a contract that when he has got it he shall pay it over."

The decision seems to conflict with Lord Reading's dictum in *Grubb* that a person may receive for or on account of another, notwithstanding that the owner has no intention of entrusting the property to him, and that it is enough that he becomes entrusted; but the actual decision in *Grubb* might be distinguished on the ground that in that case the person paying the money did intend to entrust it to someone—the company—and that that was enough to bring into being the necessary fiduciary relationship. Even in *Lord*, it may be that persons paying debts to a debt-collector know that he is collecting money for others and not for himself and therefore intend, in a sense, to entrust him. Persons dealing with South, on the other hand, intended him to be the absolute owner of the money which they gave to him. But other cases present more serious difficulties. In *Cuffin* persons buying meat from Nevanas, Ltd. presumably did not intend to "entrust" the price paid to anyone, but to make Nevanas, Ltd. absolute owners. The fiduciary relationship arose out of the arrangement between the government and Nevanas, Ltd. that the money involved should be kept in a separate account. *Messer*[13] is a similar case. There the proprietor of a taxi delivered it to Messer for the purpose of operating for hire and Messer agreed to hand over 75 per cent. of his day's takings. Messer failed to pay over anything for a particular day and was convicted of fraudulent conversion of the amount in question. On appeal it was argued that he received the fares on his own account alone and that his neglect to pay over the sum due was properly the subject of an action for a civil debt and not of a criminal indictment. The Court of Criminal Appeal held that there was evidence to go to the jury that Messer received this money for or on account of the proprietor. Surely the ordinary person, when dealing with a taxi driver, intends to make him the absolute owner of the money given in just the same way as did the persons dealing with South?

It is submitted therefore that *South* is irreconcilable with decisions of the Court of Criminal Appeal and is wrong.

Fiduciary duties arising otherwise than by contract

In all the cases so far considered the duty to pay over the converted money arose directly out of a contract. What is the position where the duty is one imposed, not by contract, but by law? An agent who receives a bribe while engaged on his principal's business is bound to account to his principal for the money received.[14] Is he guilty of fraudulent conversion if he applies the money for his own benefit? A servant who earns a secret profit by virtue of his position as servant or by utilising his master's assets is bound to account to his master for the profits so earned.[15] Is the servant who applies the profit for his own use guilty of fraudulent conversion? If so, dishonest servants such as Snowley,[16] Harris [17] and Cullum [18] who have long escaped criminal liability because of the limitations of embezzlement may be brought to book. Anyone who is overpaid under a mistake of fact is bound to repay the excess to the payer. Is a payee who, knowing of the mistake, applies the excess for his own benefit guilty? If so, the accused in *Moynes* v. *Coopper* [19] could have been found guilty under section 20.

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[13] [1913] 2 K.B. 421.

All these cases seem to fall within the dictum in *Grubb*.[20] Moreover, it would seem that in all of them the converter has no right to spend the money at all. His duty to account for it arises the moment he receives it. In this sense his position differs from that of a mere borrower, and seems rather analogous to that of the debt-collector (*Lord*) or the taxi-driver (*Messer*). There seems, however, to be no authority on any of these cases, and while the matter is open, and it certainly cannot be said with confidence that the court is likely to extend the misdemeanour to cover cases of this kind, the insistence of the courts in recent cases [21] that the money in question must have been entrusted " for a specific purpose " may well suffice to defeat an indictment in any of these cases: In *Grubb* the owners sent money for the specific purpose of investment; Cullum and Moynes were given the money to spend as they pleased. But this need not necessarily be a serious difficulty. Cuffin and Messer, too, were given money to spend as they pleased, so far as the *payer* was concerned; but their contractual duty to a third party resulted in their being entrusted for the purposes of the Act. Is there any reason why a duty imposed by law should not achieve the same result?

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[14] See, *e.g.*, *Morrison* v. *Thompson* (1874) L.R. 9 Q.B. 480; *Shallcross* v. *Oldham* (1862) 2 J. & H. 609; 70 E.R. 1202; *Lister* v. *Stubbs* (1890) 45 Ch.D. 1.

[15] See, *e.g.*, *Reading* v. *Att.-Gen.* [1948] 2 K.B. 268; affirmed [1949] 2 K.B. 232; [1951] A.C. 507.

[16] *R.* v. *Snowley* (1830) 4 C. & P. 390.

[17] *R.* v. *Harris* (1854) Dears. 344.

[18] *R.* v. *Cullum* (1873) L.R. 2 C.C.R. 28; 12 Cox 469. And see 19 M.L.R. 39 and [1957] Crim.L.R. 640, 722.

[19] [1956] 1 Q.B. 439; and see [1956] Crim.L.R. 516 and 580–581.

[20] Above p. 750.

[21] *R.* v. *Jones* (1948) 33 Cr.App.R. 11; *R.* v. *Bryce* (1955) 40 Cr.App.R. 62; *R.* v. *Hughes* [1956] Crim.L.R. 835. In *R.* v. *Greenwood* (1910) 5 Cr.App.R. 113, Channell J. said, " The Act of 1901 (*sc.* 1 Edw. 7, c. 10) was passed to get rid, amongst other things, of the difficulty created by the distinctions between a fraudulent intent at the time of receiving and a fraudulent intent at the time of appropriation."

Conclusions

It is submitted that

1. There is no sound reason for giving to section 20 (1) (iv) of the Larceny Act any meaning narrower than its ordinary natural meaning. That that meaning embraces the crimes of larceny by a bailee or servant and embezzlement should be seen as an advantage rather than otherwise. There is no virtue whatever in the division into several categories of what is essentially the same wrong—the fraudulent misappropriation of property. It should be seen as a distinct gain that the law could be simplified by bringing all these categories within the scope of a single offence.

2. The authorities, so far as they go, support the view of the wide scope of fraudulent conversion.

3. There is much to be said in favour of the extension of the crime to fill some of the gaps in the law of larceny and embezzlement considered above. While the only entirely satisfactory answer is thorough statutory revision of the law, much can be done both to simplify and to improve the law by a wider use of fraudulent conversion.

The Future of The Fixed Penalty Ticket

BY A SOLICITOR

In the course of his annual report [1] the Commissioner of Police for the Metropolis has drawn attention to what he describes as the "considerable volume" of work caused by the number of offenders against parking regulations who do not pay fixed penalties and meter excess charges within the prescribed period. He was referring to the new procedure [2] whereby offenders have the option of paying a penalty of £2 or of submitting to a prosecution. He concludes his report with these words:

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[1] Report of the Comm. of Police for the Metropolis for the year 1960. Issued July 1961. Cmnd. 1440, at p. 13.

[2] Pursuant to ss. 1 and 2 of the Road Traffic and Roads Improvement Act, 1960.

> "In fact, initial experience has shown that recent provisions designed to simplify the procedure against offenders for minor traffic offences are still too cumbersome. Unless the motoring public show a greater sense of respect for the law, both in conforming to regulations and replying to legally authorised notices, further short cuts will be inevitable."

A clue to what may be in the mind of the Commissioner has been provided in a paper entitled *Second Thoughts on Parking Meters*, by the Chief Constable of Leicester.[3] After quoting the Commissioner's words the Chief Constable adds this comment:

> "In the United States and Europe, this procedure is shortened by making the registered owner of the vehicle responsible for such offences if the identity of the driver cannot readily be determined."

Another Chief of Police has also had something to say on the subject. In the course of a recorded discussion[4] which led to a question on the difficulty of wholesale enforcement, the Commissioner of Police for the City of London provided the following example to illustrate his views:

> "Our ticket system for the meters in London is not working because the people who get the tickets don't comply with them. If they didn't comply in America it wouldn't matter because the registered owner of the car would be responsible for the offence, and it would be very easy for the police to issue an effective summons."

Defects of the fixed penalty ticket system

The fixed penalty ticket in its present form[5] says that if payment is not made within 21 days "the offender is liable to be prosecuted." It does not state in so many words that he *will* be prosecuted and it does not require any great knowledge of the law for the holder of such a ticket to realize that until he has been identified as the offender he *cannot* be prosecuted. It is this "defect" in the procedure that takes the sting out of the threat of prosecution and encourages delay in payment. Merely to reduce the time limit for payment would not assist. If it did it would assist the procedure for enforcing meter excess charges, which require to be paid within 7 days. A "short-circuit" of the procedure enabling prosecution immediately the owner is identified would be the answer. This information is of course available at short notice from local taxation offices. Such a procedure would not only enable a prosecution to follow very soon after the time has expired—at present it is taking up to 3 months in London to issue a summons—but it would also enable wardens to step up, if necessary, the present rate of issue of tickets without overburdening the administrative machinery.

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[3] Issued from the Chief Constable's Office, Leicester, October 1961.

[4] "*Are motorists beastly to pedestrians?*" *The Motor*, March 29, 1961, at p. 309.

[5] Sched., The Fixed Penalty (Procedure) Regulations, 1960.

In his report the Commissioner has said:

> "The number of tickets issued by wardens amounts to only four or five per day, but even so, with a force of sixty wardens, this amounts to 1,200 to 1,500 tickets per week."

The traffic warden force in London stands today at over 150—and recruitment is still going on. Even if the modest rate of issue of only 4 or 5 tickets per day is not exceeded (and it may be difficult to avoid this in the new zones of Soho, Holborn, and Marylebone over the Christmas period) the total weekly issue of tickets must shortly reach the alarming figure of up to 4,000 each week. The wardens will also have some 10,000 parking meters to watch, each of which during the week must record an excess charge from time to time.

The success of any "ticket" system must depend on the extent to which it is voluntarily complied with. This was fully appreciated when the provisions were first debated in Parliament, when it was thought[6] that about 20% of tickets might require prosecution. In Leicester—which is the only police authority which has issued to the public regular progress reports—the percentage requiring prosecution over a period of six month was 7·89% of the total.[7] Such a percentage, or even one of 10%, should not be beyond the resources of the Metropolitan Police. In any event, this is the proportion which should have been anticipated and it is not excessive in a system designed not to discourage access to the courts.

As for the number of tickets issued, it has to be remembered that in London these are for "meter zone" offences,[8] not for the "crystal clear" breaches of advertised parking restrictions to which the Minister referred[9] when seeking to allay misgivings during the early debates. Meter zones are notorious for the high incidence of offences. The only other areas outside Metropolitan London to have parking meters are the City of London, Bristol and Manchester. In one of these, a zone controlled by twenty-one wardens, there were 1,328 waiting offences and 1,284 non-payments of excess charges in a matter of only six weeks. In another there were 2,594 waiting offences in three and a half months.[10] The explanation for this is simply that there are not enough parking meter places or off-street parking facilities to meet the demand. Added to this is the total absence of any sign, other than at the entrance to each metered zone, to indicate that waiting elsewhere than at a parking place is an offence.

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[6] H.C. Debates, Vol. 486, col. 906, April 11, 1960.

[7] *Fixed Penalty Procedure—The First Six Months*, issued to the Press by the Chief Constable of Leicester, September 11, 1961.

[8] London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960.

[9] H.C. Debates, Vol. 486, col. 904, April 11, 1960.

The failure to supply adequate warning signs of parking places regulations was the subject recently of correspondence in the *Law Society's Gazette*.[11] The Minister has promised [12] to set up a committee to look into the matter of signs generally but in the meantime restricted streets in meter zones, in London as in Bristol and Manchester, continue to carry no signs to draw the attention of drivers to the position. The absence of signs is a particular source of difficulty to visitors, both from overseas and from areas in the country which rely on authorised signs to convey a restriction on waiting, and this is largly responsible for the number of offences committed.

Four or five tickets a day is unlikely to represent the real number of offences which traffic wardens observe. It is more likely for reasons of expediency, that the rate of issue is not higher. If wardens were to issue a ticket for every offence observed the position would get even more out of hand than at present. The "American" ticket would however enable this to be done: although such wholesale enforcement would certainly revive the early charges of lack of "discretion" on the part of traffic wardens. They would be likely to become even more unpopular than they were in the days when they were "cursed, abused, driven at and swindled." [13] (Now they are only swindled!)

Discretion of traffic wardens and police

As for the question of "discretion" which has hitherto been the stumbling block in relations between traffic wardens and the public the answer is simply that in a meter zone the exercise of discretion is impracticable. As the main police opponent to parking meters has commented.[14]

> ". . . the extent of discretion or tolerance exercised by those enforcing metered zone regulations is dictated by the

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[10] Statistics quoted in para. 7 of "*Second Thoughts on Parking Meters*," by the Chief Constable of Leicester, October 1961.

[11] pp. 499, 560, 561, August and September issues.

[12] H.C. Debates, Vol. 645, cols. 178–179, August 2, 1961.

[13] H.L. Debates, Vol. 226, col. 716, November 17, 1960.

[14] Para. 6. "*Second Thoughts on Parking Meters*,"

> need to ensure a high compliance with the meter scheme and not by the need to maintain a satisfactory flow of traffic."

The "American" ticket would avoid argument on this subject. Enforcement would be wholesale and there could be no complaints of discrimination.

Even at the present modest rate of issue of tickets the Metropolitan Police receive a large post at their Central Ticket Office. This is another item which adds to the work. The phrase "Liable to be prosecuted" suggests that the police will be amenable to an appeal, although on an offence which involves no question of guilty intent it might be supposed that appeals for clemency would fall on deaf ears. An assurance had indeed been given[15] during the preliminary debates that a decision not to prosecute would only be reached in the most exceptional circumstances. It must therefore have come as a surprise when the House learnt[16] that of 38,968 tickets issued up to April 30 last the Commissioner had decided to take no action in no less than 6,160 cases. A certain proportion of tickets cancelled may legitimately be on the ground of exceptional mitigating circumstances, although some were cancelled merely because the offender was a visitor from outside the jurisdiction. An "American" ticket would at least catch some of these foreign visitors, if they were found to be driving a vehicle registered in this country.

Attitude of courts

If the police can express their sympathy by cancelling so many tickets no complaint should be made of the general leniency shown by the courts. Stipendiary magistrates have listened with great patience to the pleas in mitigation offered by the hundreds of offenders who have elected a court hearing. It is quite exceptional for a driver who is legally represented to receive a fine exceeding the fixed penalty. The average fine is 30s., the most common fine being one of 20s. An absolute discharge is awarded in about 10 per cent. of all cases legally represented. This attitude reflects the sympathy of the courts in cases where there are genuine mitigating circumstances. It is interesting to note that at Leicester where the justices are dealing with a similar offence but one which implies a total disregard of well-advertised "no waiting" restrictions there has not been a single order of absolute discharge and offenders rarely gain any financial advantage by electing a court hearing. There are however signs that in London the "market" is hardening!

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[15] H.L. Debates, Vol. 224, col. 1051, July 5, 1960.

[16] H.C. Debates, Vol. 642, col. 632, June 15, 1961.

The fixed penalty ticket in the provinces

Fortunately the ticket experiment has not been confined to London. It operates also in the City of London, in the City of Leicester and in the County Borough of Blackpool.[17] Chiefs of Police are normally shy about revealing their vital statistics but the Chief Constable of Leicester has been very forthcoming in this respect. He had a particular reason for this since he has decided views on the merits of conventional means for the control of parked vehicles and he was strongly opposed to the city's plans to introduce a parking meter scheme. He was primarily responsible for a revised traffic order [18] to deal with notorious congestion in the city centre. He also had taken the daring step of employing a number of women traffic wardens. And in view of the constant criticism in London of the failure by traffic wardens to exercise " discretion " he went so far as to release to the Press his instructions to wardens. Throughout he took the local press into his confidence and he published at regular intervals the results of the fixed penalty procedure. He has now won his battle with the city surveyor and the plan for a 500-meter scheme in Leicester has been shelved.

The City of Leicester's experience has been that 89 per cent. of all tickets issued are paid voluntarily. Of the balance, payment has been excused in less than 4 per cent. and proceedings have required to be instituted in less than 8 per cent. Admittedly the total number of tickets issued bears no comparison with London—a mere 1,241 over a period of six months—but no complaint has yet come from the Chief Constable that the prosecution procedure is unduly cumbersome; nor has there been any hostility shown in Leicester towards traffic wardens. Enforcement has been severe but the public appears to have accepted the procedure while the deterrent effect of strict enforcement has been marked. The total weekly rate of issue of tickets has fallen from an average of fifty in the first weeks to only ten at present. Police prosecutions before the procedure totalled over 200 in one month and these have now fallen to under thirty.

If this is not sufficient evidence that the ticket in its present form can work efficiently one can but ask leave to call the Commissioner himself to explain what he meant when in April last he reported the system to have been " an unqualified success." [19]

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[17] The Fixed Penalty (Areas) Order, 1961.

[18] The Leicester (Traffic Regulation) Order, 1960.

[19] H.C. Debates, Vol. 520, col. 816, April 28, 1961: " . . . I think hon. members would like to know that I am told that the Metropolitan Police report that the ticket system has been an unqualified success ": *per* the Joint Parliamentary Secretary to the Ministry of Transport (Mr. John Hay).

This was reported in spite of a prosecution rate of one-third of tickets issued. Since the number of tickets issued increases with the number of wardens employed the Commissioner may be getting discouraged by his success. It is rather like *Alice in Wonderland,* " If seven maids with seven mops were to sweep for half a year, do you suppose, the Walrus said, that they could get it clear? " It will be remembered that the Carpenter doubted this.

The enforcement of unpaid penalty tickets is however only a part of the problem. There will shortly be some 10,000 parking meters in operation, and if the experience of the City of London is anything to go by this should produce about 4,000 unpaid meter charges to cope with each week. The great majority of these will no doubt be paid eventually but if a meter excess charge is not paid within seven days the duty of the police is strictly to initiate proceedings. These proceedings possibly represent more work than on the unpaid penalty ticket, many of which can be written off after investigation. It is however confusing the issue to attribute the work involved in chasing up those who do not pay a meter excess charge promptly to any alleged deficiencies in the fixed penalty system. What however is surprising is that the Commissioner should have undertaken the task of collecting revenue for the local authorities' meter schemes. The City of Westminster made a nice profit of £85,000 [20] in its first year before traffic wardens were introduced. No doubt, with two jobs to do, wardens are not as punctilious in issuing excess tickets as borough parking attendants and it would seem to be in everyone's interests if the job of enforcing unpaid meter charges was returned to the local authority. This at least would lighten the burden on the Metropolitan Police. And while one is referring to the profits made from meter schemes it perhaps is not out of place to mention that at the present rate of issue the penalty ticket shows a likely " profit " of up to half-a-million pounds a year—a pleasant benefit for the Road Fund [21] which should sweeten any tears over the work involved in collecting it from those who feel that enough is sometimes more than enough.

Where fines are not paid

But what are the " inquiries " that require to be made after 21 days in the case of a fixed penalty ticket and after 7 days in the case of an unpaid excess charge? They are inquiries to trace the offender, remembering that the " ticket " in each case is addressed to a person unknown. The offender is the person who caused the vehicle to wait or the driver of the vehicle which incurred the excess charge. He must be traced through the vehicle registration authority who can only in the first instance supply the particulars of the person last registered as the owner. Section 232 of the Road Traffic Act, 1960, which largely re-enacts the provisions of section 113 of the 1930 Act, is invoked. This makes it an offence for the owner not to supply the police with information leading to the identity of the driver. In addition to the owner " any other person " is required to assist the police. A person who fails to comply with the provisions of section 232 is guilty of an offence " unless he shows to the satisfaction of the court that he did not know and could not with reasonable diligence have discovered who the driver of the vehicle was." There is no time limit for supplying this information so that if the owner ignores a written request arrangements have to be made for him to be interviewed. If it transpires that owner and alleged offender are not the same person the identical procedure has to be carried out again in respect of the person named by the owner. The opportunities for delaying tactics are obvious and it is altogether not surprising that in London at present it is taking up to 3 months to issue a summons and it may be six months before a " ticket " case reaches a hearing. It would clearly simplify matters altogether if the law was so changed as to make the registered owner vicariously liable for any offence for which a " ticket " had been issued. It has even been heard suggested that there might be a further refinement by way of putting a ban on the renewal of the registration of a vehicle so long as an unpaid fine remained on the file.

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[20] H.C. Debates, Vol. 520, col. 815, April 28, 1961.
[21] H.L. Debates, Vol. 244, col. 1038, July 5, 1960. Lord Bathurst.

If by " further short cuts " in the fixed penalty procedure the Commissioner has in mind a " short-circuit " on the lines of an American " ticket " (as seems indicated by the remarks of the Commissioner for the City of London and the Chief Constable of Leicester) then it would have to be agreed that this would indeed be an unpleasant shock for motorists. It would be a shock also for lawyers, who might have supposed that the high-water mark of absolute vicarious responsibility had already been reached by the decisions in *James* v. *Smee*[22] and *Green* v. *Burnett*.[23] But in the name of expediency all things are possible and it remains to be seen whether or not the Commissioner's threat is an empty one.

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[22] [1954] 3 W.L.R. 631.

[23] [1954] 3 All E.R. 273.

Mr. Sutterthwick's Court

By A. E. Jones,
Magistrates' Clerk

Stealing from an employer

From the elevation of the bench Mr. Sutterthwick was accustomed to seeing young men whose sex, at the bidding either of a passing fashion or a more permanent aberration, was denied by their appearance. From the same vantage point he was familiar also with young women who sported versions of male garb cunningly contrived to emphasise their femininity. But the individual announced by P.C. Mure, the assistant gaoler, as " Charge Number Twelve " was ambiguous in quite a different way. The clothes were drab, workaday and masculine, consisting of jacket, trousers, pullover and open-necked shirt ; the hair was short-cropped and lacklustre ; the face looked untouched by make-up—or even water ; but the figure was slight and unmuscular ; ear-rings dangled almost to its shoulders ; and it terminated in high-heeled shoes.

The magistrate looked at the register in front of him and saw that the prisoner's occupation was given as " van driver " and the name appeared to be Frances Carstack. Mr. Sutterthwick did not feel certain, however, that the " e " in the Christian name was not a badly written " i." Leaning towards the clerk he said quietly, " Mr. Frell, what sex is this defendant? "

" Female, sir," murmured Frell. He had himself been doubtful at first sight, but he accepted the assurance of the charge sheet. The entry under the heading " Occupation " on charge sheets might on occasion have more foundation in the prisoner's imagination than in solid fact, but it was unthinkable that anyone could get the police to put down the wrong answer after " Sex."

Mr. Sutterthwick sat back and observed Frances Carstack carefully, while apparently studying the charge entered in the register against her name. She was accused of stealing as a servant a carton containing six twin-sets, valued at £15, the property of Ragtrade (Mantles and Gowns), Ltd., her employer.

The company was not legally represented but the detective constable engaged in the case took it on himself to say that the prosecution asked for summary trial. After being addressed by the clerk in the statutory terms, the defendant accepted the magistrate's jurisdiction and pleaded guilty—all with the crisp briskness of one accustomed to taking responsibility for business decisions.

Case for the prosecution

"What are the facts?" asked the magistrate.

"The prisoner, your worship, is a single woman," announced the detective. "She has been employed by this company, which is a wholesale clothing concern, for the past five months. Her duties were to deliver goods by van to customers, and her wages were £9 10s. a week, plus some overtime. Yesterday, as the managing director was returning from his morning coffee rather earlier than usual, he noticed the defendant's van parked outside the company's premises and the defendant in process of loading it. A number of packages were piled up in the passageway of the warehouse, and he happened to observe among them the carton of twin-sets which is the subject of the charge. The managing director knew that the defendant should be delivering only coats on that particular journey, and that twin-sets should not have been with her load. He made inquiries and ascertained that none of the warehouse staff knew anything of the carton. The defendant, in the course of her duties, would have access to the stockroom where twin-sets were stored, and, as she later admitted, she did, in fact, take the property from there. The managing director kept observation from his office and saw that she loaded the carton, as well as coats, on to her van. He then telephoned the police and she was stopped a short distance from the warehouse after she had started on her round. When questioned by me, your worship, she readily admitted her guilt."

"Is that all correct—what he has just told me?" said Mr. Sutterthwick to the defendant.

"Perfectly correct," she replied curtly.

A trap to catch a thief

Before the magistrate could ask about her antecedents, Frell, who had been very busy with Stone's *Justices' Manual*, got up and said in a low voice: "I'm not very happy about this charge, sir. As the managing director allowed her to take the goods away, although he could have stopped her, it seems doubtful to me whether there was any asportation. *R.* v. *Turvey* [1]—decided in 1946—makes it clear that there is no larceny if the owner of goods consents to their passing out of his control into the possession of a thief—even when that is done merely for the purpose of trapping the thief."

"But, in this case, the goods belonged to a limited company and the company didn't agree to the defendant's taking them," objected Mr. Sutterthwick.

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[1] (1946) 31 Cr.App.R. 154.

"The company must act by agents, and surely, sir, the acts of its managing director would bind it in a matter like this," replied the clerk.

"Does that mean, Mr. Frell, that you think she hasn't committed any offence?"

"No, sir, but I think it may be only attempted larceny."

"Well, can't I convict her of that instead of the full offence?"

"No, sir; that would only be possible if she had been indicted. It isn't open to a magistrates' court to convict of an attempt when the charge is larceny."

"What is your suggestion, then?"

"I don't feel that this case can be decided properly unless it is fully argued, sir. The facts aren't quite on all fours with the case I've just mentioned. They seem to me to be about half way between that case and the much older case of *R.* v. *Egginton*[2] where it was held to be larceny when goods were taken from the premises of a prosecutor who had left a door open to facilitate the theft, with the intention of catching the thief. If the prosecution in the case before you were to be legally represented, and you gave the defendant free legal aid, the point could be gone into fully, sir—assuming, of course, that you allowed her to withdraw her plea of guilty."

"It was a perfectly clear plea and a perfectly simple charge, Mr. Frell."

"Simple larceny is not always simple to the layman's understanding, sir."

Mr. Sutterthwick considered for a few moments and then said: "I'm not supposed to grant free legal aid unless it is in the interests of justice; and I don't think it is in this case."

"It's for you to decide, sir. I only felt I ought to draw your attention to what seemed to me a legal difficulty," said the clerk, somewhat disappointed that the case was not to offer the technical interest of a legal argument between counsel.

"I'm obliged to you, Mr. Frell; but I don't think it would change the situation much if she were further charged, after a remand, with attempted larceny, and then convicted of that. It certainly wouldn't alter my powers in dealing with her," remarked Mr. Sutterthwick. He turned to the detective constable and said aloud: "I hope that you have impressed on the managing director that it is not a good idea for a layman to do this sort of trapping of a thief, without consulting the police beforehand. It is liable to create awkward legal complications."

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[2] (1801) 2 Bos. & P. 508; 2 Leach 913.

"Yes, your worship, the prosecutor has been given certain advice," replied the officer. He could guess what the clerk had been inaudibly discussing with the magistrate; the case had already been the subject of keen legal debate at the station. He did not agree, himself, with the form of the charge, but he had to accept the decision of a superior officer.

The defendant's character

"I should, in fairness, say, your worship, that the defendant was not under suspicion previously, and the managing director acted on the spur of the moment, in a manner of speaking," he added.

"I'm glad to hear that she is not suspected of having done this sort of thing before," said the magistrate. "What is known about her?"

"Very little, at present, I'm afraid, your worship. She states that she is of no fixed abode, and she has refused all particulars regarding herself. She has also declined to have her fingerprints taken; and I would ask your worship, in those circumstances, to make the necessary order so that we can ascertain whether there are any previous convictions."

"That application can't be made by an officer of lesser rank than inspector," the clerk pointed out.

Inspector Campting spent most of his time at the court, just watching proceedings in case something cropped up which demanded the intervention of a senior officer. This was one of the occasions that justified his vigil. "I respectfully ask for an order under section 40 of the Magistrates' Courts Act, 1952, to have the fingerprints of this prisoner taken, your worship," he said.

"Certainly. I'll put the case back for that to be done," said the magistrate.

The detective constable recollected that there was something else he had to say. "I should inform your worship that a friend of the defendant has come to the court and is anxious to speak to your worship on her behalf," he interposed quickly before P.C. Mure could take Frances Carstack from the dock.

"I'll hear her now, if she can say anything to help me," said Mr. Sutterthwick.

The officer went to the door leading to the waiting hall and beckoned in a large, rather blowsy woman who was dressed quite smartly, but in a fashion which suggested that she could not make up her mind whether to stay young or accept approaching middle age. On seeing her the prisoner frowned angrily and seemed about to say something, but thought better of it. The new arrival was ushered into the witness-box, and Mr. Sutterthwick said: "I understand that you are a friend of the defendant, madam. How long have you known her?"

"About five years," was the reply, after a pause for some mental arithmetic.

"What do you wish to say to me?"

"Only that I have the highest opinion of her, sir. She has been very good to me; I owe her a lot; and I've never known her do anything wrong. I'm sure this affair was just a sudden temptation and nothing like it will ever happen again. I'll promise to look after her and see she doesn't get into trouble again, if you'll give her another chance, please, sir."

"How are you going to look after her?" inquired the magistrate.

"She can live with me, sir."

"Well, it's very good of you to make this offer of help, madam. But I can't make up my mind what to do with your friend until I know some more about her. She hasn't been very forthcoming with the police. Perhaps you can give her some good advice on that point. She's being put back for inquiries now, and I suggest that you both see Miss Garrafrey, the probation officer, and discuss things with her."

Miss Carstack was led away by the assistant gaoler, and Miss Garrafrey accompanied the large woman out into the gaoler's office. The court went on to deal with a defaulting slate club secretary and a homeless vagrant who had ordered and consumed an expensive meal without any hope of being able to pay for it. Then Miss Garrafrey and the detective constable returned to the court-room with the prisoner's friend, and P.C. Mure announced: "They're ready now with the case of Frances Carstack, No. 12 in your list, your worship."

"Bring her back, then," said the magistrate, and soon she stood again in the dock.

"Have you anything to report to me, Miss Garrafrey, now that you've had an opportunity of seeing the accused and her friend?" asked Mr. Sutterthwick.

The probation officer had appeared anxious to stay in the background and allow the detective constable to reoccupy the witness-box; but the magistrate's question obliged her to come forward. "I'm afraid there is very little I can say to help in this case, sir," she announced. "I have seen both those women, as you requested. Actually, I knew the defendant's friend already. She was formerly a prison after-care case of mine." In view of further information which would be imparted to the magistrate, Miss Garrafrey did not think it right to add that the two women had first met while serving prison sentences; but she did think it her duty to add: "The defendant and her friend have been residing together for some time. They are known in the neighbourhood where they live as Mr. and Mrs. Carstack."

"It must be a very peculiar neighbourhood," commented the magistrate.

"It is," said Miss Garrafrey, and continued: "I understand that the police are asking for a remand now to make inquiries regarding some property which has just come to light. It seems likely that further charges of stealing as a servant will be preferred against the defendant, so perhaps I had better not say any more at this stage."

"There is just one thing I would like to know—if it is not prejudicial to the prisoner," said Mr. Sutterthwick. "As she stated she had no fixed abode, she was, presumably, not released on bail last night. How, then, did this other woman get to hear of her predicament?"

"Through another person working at the same place as the defendant, sir," said the probation officer.

"Thank you, Miss Garrafrey. I'll hear the officer now." While the detective constable was making his way to the witness-box, Mr. Sutterthwick murmured to the clerk: "Well, Mr. Frell, it looks as if, next week, we shall be able to deal with a larceny that the managing director didn't acquiesce in."

On remand

The detective prevented any reply from Frell by announcing: "As the probation officer has mentioned, we are respectfully asking for a week's remand in this case, your worship. The managing director of the company has recognised some of the clothing worn by the prisoner's friend. The articles in question are exclusive to his company and have not yet been distributed to retailers; so they should not be in the possession of an ordinary member of the public. There may be a further accused, as well as further charges, next week, when our inquiries are complete, your worship."

"In that case, I'd better not hear any more today," said Mr. Sutterthwick.

Frances Carstack turned towards the back of the court and said bitterly: "You silly little fool, Annie. Now look what you've done. Why didn't you keep out of it? I've told you over and over again that you've got no head for business."

The Vehicles (Excise) Act, 1949—Authority to Prosecute

By G. S. Wilkinson,

Solicitor, Clerk to the Cambridge City Magistrates

In an interesting article at p. 527 *ante*, Mr. K. C. Clarke discusses the question as to who may prosecute for offences under the Vehicles (Excise) Act, 1949,[1] and how far such prosecutions require general or specific authorisation from the local authority concerned. It seems clear that, save for prosecutions under section 13 and section 15 (1) of that Act (which relate respectively to under-payment and non-payment of duty), any person may institute proceedings for offences under the Act or regulations made thereunder. This writer agrees with the opinion of Mr. Clarke that, by virtue of section 5 (5) of the Finance Act, 1956,[2] councils may now delegate to their committees, members or officers a general power to take proceedings under sections 13 and 15 (1) and the contrary opinion at p. 183 of *Road Traffic Offences* (3rd Edition) is withdrawn.

Proceedings by constables

A different opinion, however, will be put forward as to the institution of proceedings by constables under section 13 or 15 (1) and it will be submitted that constables still require specific authority in each case from the council or from one of its duly empowered officials. A constable is not an officer of a local authority and consequently any delegation given pursuant to section 277 of the Local Government Act, 1933, cannot be made in favour of a constable (*Oberst* v. *Coombs*[3]). Mr. Clarke cites the case of *Tyler* v. *Ferris*[4] in support of the view that a general authority can be given by a council to a constable to institute proceedings under section 13 or 15 (1) in any cases he thinks fit. Certainly, the wording of the statutes considered in *Tyler's* case and that of section 5 (5) of the Finance Act is very similar. *Tyler's* case was concerned with prosecutions by an inspector of weights and measures, who would be a servant of the council concerned and subject to the latter's control at all times. A constable, however, as stated, is not a servant of the council and not subject to any control by it in regard to prosecutions of any offences, *e.g.*, for theft. Once he has been given a general consent to prosecute under sections 13 and 15 (1), presumably he can have people summoned for any offences under these two sections, however trivial they may be. The constable can thus, once he has his general authority, prosecute for offences which the council would have ignored or for which even it would have refused to take proceedings; he can, to some extent, defy the council's wishes, unlike the town clerk or the inspector of weights and measures who, being council officials, can be disciplined and possibly overridden, with the objectionable prosecutions withdrawn in consequence. All the council could do in respect of a constable would be to revoke his general authority and presumably any proceedings instituted prior to revocation could go on. One may question whether the wording of section 5 (5) would not have been in clearer terms if it had been intended to give such a wide, general authority to constables, and a particular difficulty arises in respect of the council's powers to mitigate and remit penalties for offences of non-payment or under-payment of duty (Customs and Excise Act, 1952,[5] s. 288 (*a*), Vehicles (Excise) Act, 1949,[6] s. 8 (3), and Road Vehicles (Excise Duties and Licenses) Order, 1953, art. 2 (*c*)). Once a general power to prosecute has been given to a constable, the council gives up, in effect, its powers to mitigate or remit penalties, for it will not hear, unless he sees fit to inform it in advance, what cases are to be brought by him. Once again one may question whether, if such a surrender of powers were intended, clearer words would not be used.

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[1] 12, 13 & 14 Geo. 6, c. 89.

[2] 4 & 5 Eliz. 2, c. 54.

[3] (1955) 119 J.P.N. 179; 53 L.G.R. 316.

[4] [1906] 1 K.B. 94.

A recent enactment

Some *ex post facto* support for the view that section 5 (5) of the Finance Act, 1956, does not confer the power to give constables a general consent to prosecute comes from section 11 of the Finance Act, 1961,[7] which reads:

"(1) Notwithstanding anything in section 281 of the [Customs and Excise Act, 1952], as applied under section 313 of that Act, a local authority in England or Wales may authorise the bringing by any constable of proceedings, or any particular proceedings, for an offence under the excise Acts relating to any duty of exise . . . (for licenses for dealing in game, killing game,) . . . (guns, hawkers, moneylenders, pawnbrokers or refreshment houses).

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[5] 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44.

[6] *Ante.*

[7] 9 & 10 Eliz. 2, c. 36.

"(2) A document purporting to be a copy of a resolution authorising the bringing of proceedings in accordance with this section and to be signed by an officer of the local authority shall be evidence, until the contrary is shown, that the bringing of the proceedings was duly authorised."

It will be seen that section 11 (1) refers both to "proceedings" and "any particular proceedings" and thus seems to differentiate between a general power to prosecute and one given for particular proceedings.

General resolutions

A further argument in favour of the view that section 5 (5) is not intended to confer a general power on a constable to prosecute whenever he wishes comes from the reference in paragraph (*a*) of the subsection to a consent given on behalf of the council by a duly authorised officer and proved by the production of a document purporting to be the consent so given and signed by the officer giving it. If it were intended to allow constables to be given a general consent to prosecute in any cases under section 13 or 15 (1) that they chose, it would seem unnecessary to go to the lengths of saying that the council's consent might be given on their behalf by a duly authorised officer and proved in the way indicated; a copy of a resolution of the council stating that "the Chief Constable may institute proceedings under sections 13 and 15 (1) of the Vehicles (Excise) Act, 1949, in any case he thinks fit" would suffice to show the Chief Constable's authority to prosecute. It is true that there seems to be no statutory provision of general application stating unequivocally that a resolution of a local authority may be proved by production of a copy thereof authenticated by the clerk or his deputy but it is submitted that the combined effect of the Evidence Act, 1851,[8] s. 14, and the Local Government Act, 1933,[9] Sched. III, Pt. V, para. 3 (1), has this result. In passing, it may be noted that the last-cited provision is in less wide terms than para. 10 of Sched. I of the Public Health Act, 1875,[10] which specifically declared that "copies of any resolutions" passed at a metting, if signed by the appropriate chairman, should be received as evidence in all legal proceedings. If such a resolution as set out above, giving a general authority to a Chief Constable to prosecute, can be passed and proved by the signature of the town clerk, why then did the draftsman of section 5 (5) think it necessary to refer to a "duly authorised officer" giving that consent? The general consent could, anyhow, be proved in just the same way as a like consent given to the town clerk or the controller of licences, and a special statutory provision for the purpose is quite unnecessary. It is suggested that the wording of section 5 (5) (*a*) is more apt for cases where separate consent for each prosecution instituted by a constable is required. If it is asked what then is the meaning of paragraph (*a*), it is submitted that its enactment was due to parliamentary realisation of the facts of life, *viz.*, that many excise offences are discovered at the same time as other road traffic offences but that long delays might result if the police waited for the council's authorisation to prosecute the excise offence before prosecuting the road traffic ones. It still happens that a motorist without a driving and an excise licence has the two cases dealt with on different days. If the constable has the requisite permission to proceed on all charges simultaneously, then these delays do not occur, the witnesses attend court only once and the offender has everything dealt with at one time. To obviate the council giving up its powers of mitigating penalties and general control of vehicle excise prosecutions, the power to say whether or not the offender is to be prosecuted, if not retained by the council or committee, is vested in one of its members or officers, pursuant to section 277 of the Local Government Act, 1933. When an offence under section 13 or 15 (1) is reported to him by the police, he can, by virtue of section 5 (5), decide whether or not it shall be prosecuted and, if he decides in favour of taking proceedings, he can then tell the constable to go ahead; the consent is provable as indicated in pragraph (*a*). The above interpretation, it is submitted, avoids the difficulties arising from giving general consents to constables and is justifiable from the wording used. That wording, on the other hand, is not, it is submitted, clear enough to spell out plainly and unequivocally a power to authorise a constable to prosecute in matters affecting the affairs of a council whenever he (the constable) sees fit.

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[8] 14 & 15 Vict. c. 99.

[9] 23 & 24 Geo. 5, c. 51.

[10] 38 & 39 Vict. c. 55.

Difficulties of section 5 (5)

Of course, the arguments advanced by Mr. Clarke should be given careful weight and one can certainly agree with him that the whole question is not free from doubt. A rather unusual feature of section 5 (5) is the lack of any authoritative comment upon it. No reasons for its passing were given in Parliament during the passage of the Finance Bill except to say that it was to " remove doubts " which had arisen regarding prosecutions for vehicle excise offences. What those doubts were and who were the latter-day St. Thomases who felt them was not stated. No explanatory circular appears to have been issued by the Ministry of Transport to local authorities when the Bill was passed, beyond a short one setting out the subsection itself. The textbooks have not commented upon it save that, as Mr. Clarke points out, the editors of *Stone* have omitted any reference to *Jones* v. *Wilson* [11] since 1956. In the meantime, it is suggested that, until the position is clarified by judicial decision or further legislation, no general consent should be given to a constable to institute proceedings in any case that he thinks fit.

Practice and Procedure

Practice Note

Lord Parker C.J., sitting in the Court of Criminal Appeal (with Slade and Veale JJ.: October 5, 1961: [1961] 1 W.L.R. 1321) said that the court desired to give the following direction: We would like to draw attention to the fact, which is often forgotten, that the Court of Criminal Appeal have power on an appeal against sentence not merely to decrease the sentence but to increase it. The court from time to time comes across cases where in its opinion the sentence is inadequate and the court will not hesitate in appropriate cases to exercise that power to increase the sentence.

In the future, when leave to appeal against sentence is given, whether by the single judge or by this court, the order will be:

> " Leave to appeal against sentence. Legal Aid. Counsel " or " Solicitor and Counsel " as the case may be.

Neither the court nor the single judge will indicate the reasons for granting such leave. Further, the court will discontinue the practice of treating the application when granted as the hearing of the appeal, except in cases where counsel for the applicant is present and consents.

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[11] [1918] 2 K.B. 36.

Case and Comment *

EVIDENCE

Confessions—admissibility of—inducements

R. v. M.

Court of Criminal Appeal: Slade and Glyn-Jones and Thompson JJ.: October 26, 1961: *The Times,* October 27, 1961.[1-2]

M. was convicted at quarter sessions of larceny in a dwelling-house. The facts were that a handbag and money were stolen from a private flat situated over a girls school where M. was a pupil. In the course of interviews with the headmistress, M. made three confessions, which were conceded at the trial to be inadmissible on the ground that the headmistress had used improper inducements. A fourth confession had been made by M. to a fellow pupil, aged 12 years. This confession was the only evidence on which the conviction could be based. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that the questions for this court were, first, whether the Chairman of quarter sessions was right in law in admitting the evidence of the fellow pupil as to the confession and, secondly, if the evidence was legally admissible, whether he had exercised his discretion rightly in refusing to exclude it. On the question of inadmissibility, the test was whether the prosecution had proved beyond reasonable doubt that at the time of the alleged conversation between M. and her fellow pupil the inducement made earlier was no longer in operation. The circumstances were entirely different; the relations of the parties were different; the respective ages were different; and it seemed to this court almost extravagant to suggest that the answers made by M. to her fellow pupil, who was three years younger than her, were given as a result of an inducement or threat issued at an earlier conversation with the headmistress. On the question of discretion a judge always had discretion to exclude evidence in cases where its prejudicial effect outweighed its probative value. In the case of a confession it could not be argued that its prejudicial effect outweighed its probative value, since there was no evidence of a higher probative value than a confession. It was true that the evidence of the fellow pupil was uncorroborated. However, it did not require corroboration as a matter of law and the jury had been warned to view the evidence with the closest scrutiny. In the circumstances this court was satisfied that the Chairman had exercised his discretion rightly. Accordingly the appeal would be dismissed. [H. P.]

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1-2] For the appellant: *N. R. Fox-Andrews, Q.C., J. Miskin* (instructed by Messrs. Hepburns). For the Crown: *Paul Wrightson* (instructed by the Solicitor, Metropolitan Police).

Commentary. Where the accused makes a succession of statements of which the first is inadmissible because of some threat or promise which induced it, " the principle to be deduced from the cases is this: if the threat or promise under which the first statement was made still persists when the second statement is made, then the second statement is inadmissible. Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated, can the second statement be admitted as a voluntary statement ": *R.* v. *Smith* [1959] 2 Q.B. 35.

The principle that the judge has a discretion to exclude evidence where its prejudicial effect outweighs its probative value has been constantly reiterated in recent years. See *Noor Mohammed* v. *R.* [1949] A.C. 182, 192; *Harris* v. *D. P. P.* [1952] A.C. 694, 707; *R.* v. *Bartlett* [1959] Crim.L.R. 285. The important limitation imposed on this discretion in the present case seems to be a logical one. In assessing the probative value of the evidence, one must assume that it is true. Evidence of a confession, if true, is conclusive. It is of course always open to the jury to reject the evidence of the confession or to hold, notwithstanding the contrary ruling of the judge in admitting it, that it is involuntary: *R.* v. *Murray* [1951] 1 K.B. 391.

Sexual offence—corroboration—identification—admission of further evidence on appeal

R. v. Parks

Court of Criminal Appeal: Lord Parker C.J., Slade and Ve[illegible] JJ.: October 4, 1961: *The Times*, October 5, 1961.[3]

P. was convicted at quarter sessions of indecent assault upon a Mrs. M. At the trial Mrs. M. gave evidence that, in the evening of January 17, 1961, in a lonely, ill-lit alleyway, she was assaulted by a man whom she identified as P. P.'s evidence was that he was not the man in question. The case was left to the jury on the basis that there was corroboration of the complainant's evidence. P. was a man of good character. After the trial it became known that Mrs. M. had a number of previous convictions and leave was sought to re-call her for cross-examination on the hearing of the appeal. The Court of Criminal Appeal gave leave and heard further evidence from Mrs. M. and also from a Mr. S. The reasons for hearing further evidence were given as follows:

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[3] For the appellant: *J. L. Clay* (instructed by Messrs. Victor Mischon & Co.). For the Crown: *W. M. F. Hudson* (instructed by the Solicitor, Metropolitan Police).

Held, allowing the appeal, that the principles upon which this court should act in allowing further evidence were here satisfied. First, Mrs. M.'s previous convictions were not known and could not reasonably have been known at the time of the trial. The convictions were under a different name so that no possible blame attached to the police for failing to inform the defence of the convictions. Secondly, the evidence was relevant to an issue in the case. The complainant admittedly had no great opportunity to identify her assailant. Counsel for the appellant had put it this way: that albeit the complainant may have thought quite honestly that P. was her assailant, yet being a dishonest person she was not so prone to be frank with the court and would not retreat from her allegations that he was her assailant even if she were satisfied in her own mind that he was not. This court had concluded that these convictions were just relevant. Thirdly, the evidence was credible evidence in the sense that it was well capable of belief. Mrs. M. had in fact quite frankly admitted these convictions. Lastly, the evidence might have had an effect on the minds of the jury. This court had also heard the evidence of Mr. S. who had been in the vicinity of the scene of the assault. His evidence was that he heard a woman scream and that, immediately afterwards, a man, who did not answer the description of P., had run past him. This evidence also fell within the principles upon which this court acted in allowing further evidence. It was well known that questions of identification were difficult.

If the further evidence had been given at the trial it was impossible to say that the jury might not have had a reasonable doubt about the matter. This court had, with some hesitation, concluded that it would be unsafe to allow this conviction to stand.

[H. P.]

Commentary. The Court of Criminal Appeal has power to hear fresh evidence under section 9 of the Criminal Appeal Act, 1907, but the practice is to use this power only in special circumstances—*e.g.*, where it is shown that the proposed witnesses were not available at the trial or that some point which could not have been foreseen arose at the trial on which the evidence would have been relevant. *Cf. R.* v. *Rigby* [1954] Crim.L.R. 62; *R.* v. *Jordan*, 40 Cr.App.R. 152; [1956] Crim.L.R. 700; *R.* v. *Musial* [1956] Crim.L.R. 843.

When the court has heard fresh evidence it follows the same principle as governs the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907: *i.e.*, it dismisses the appeal only if satisfied that no reasonable jury, properly directed, would or could have come to any other conclusion than that to which they did come and that no miscarriage of justice has actually occurred: *R.* v. *Collins* (1950) 34 Cr.App.R. 146. Fresh evidence as to the convictions of a prosecution witness will rarely be so important as in the present case where the witness in question was the uncorroborated complainant in a sexual case, whose evidence should be looked at exceptionally closely (if not regarded with suspicion) from the start. It therefore by no means follows from this case that a conviction will necessarily be quashed where fresh evidence which was not available at the trial is tendered to show that one of the prosecution witnesses has previous convictions.

The present case is another of a multitude of cases which illustrate the need for the Court of Criminal Appeal to have power to order a new trial.

Admissibility of a confession—question for the jury

R. v. Plummer

Court of Criminal Appeal: Finnemore, Havers and Stevenson JJ.: September 22, 1961: *The Times*, September 23, 1961.[4]

The court dismissed P.'s application for leave to appeal against his conviction at quarter sessions of unlawful possession of Indian Hemp on the ground that it had been for the jury at the trial to decide the issues involved. Finnemore J. said that one thing was quite plain, namely, that it was impossible for the Court of Criminal Appeal to try an issue, such as whether a written statement had been made under duress, without seeing any witnesses. The jury having accepted the evidence for the prosecution, it was impossible for this court to interfere. [H. P.]

Commentary. If a statement is made under duress, it is, of course, inadmissible. The onus is on the prosecution to satisfy the judge beyond reasonable doubt (*R.* v. *Sartori* [1961] Crim.L.R. 397) that the statement is voluntary. Presumably the judge in the present case was so satisfied. Even when the judge has decided that the statement is voluntary and admissible it is not enough for him to leave the statement to the jury in the form, " Do you believe the statement, or do you not? ": he must direct the jury that the onus is on the prosecution to satisfy them beyond reasonable doubt that the statement is voluntary: see *R.* v. *Francis* [1959] Crim.L.R. 594. While the admissibility of the confession is a question for the judge, its weight and its value are for the jury and, if they decide that it was an involuntary statement made under duress, they should attach little or no importance to it.

In the present case, the court found that the jury had been properly directed as to the onus of proof.

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[4] The appellant did not appear and was not represented.

Diminished responsibility—weight of medical evidence

See R. *v*. BAILEY, below.

HOMICIDE

Murder—diminished responsibility—weight of medical evidence

R. v. Bailey

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Veale JJ.: October 23, 1961: *The Times*, October 24, 1961.[5]

B. was convicted at assizes of the murder of a sixteen-year-old girl by beating her to death with an iron bar. The defence at the trial raised a plea of diminished responsibility. Three doctors were called to substantiate that plea. All three gave evidence to the effect that they considered that at the time B. was suffering from abnormality of mind by disease and that his mental responsibility was impaired. One doctor said that it was highly probable that at the time B. was in fact in an epileptic, upset or fit. No evidence was called to dispute this medical evidence, although counsel for the prosecution tested it in cross-examination. The trial judge, summing up, said that the medical evidence was important but not binding and that all the opinions were one way. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that this court had said that a jury was not bound by what medical witnesses said. However, the jury must act on evidence and, if there was nothing before them to throw doubt on the medical evidence, then that was all that was left and they must accept it: *R.* v. *Matheson* (1958) 42 Cr.App.R. 145. Nothing that this court had said in *R.* v. *Byrne* (1960) 44 Cr.App.R. 246, threw any doubt on the decision in *Matheson's* case. In these circumstances, this court concluded that the verdict of the jury was unreasonable and could not be supported, and a verdict for manslaughter on the ground of diminished responsibility must be substituted for that of murder. The sentence would be one of life imprisonment. [H. P.]

Commentary. Compare *R.* v. *Rivett* (1950) 34 Cr.App.R. 87, where a verdict of guilty of murder was upheld, although all the medical evidence was to the effect that the accused was insane. In that case Lord Goddard emphasised (at p. 94) " that it is for the jury and not for medical men of whatever eminence to determine the issue. Unless and until Parliament ordains that this question is to be determined by a panel of medical men, it is to a jury, after a proper direction by a judge, that by the law of this country the decision is to be entrusted." Lord Goddard said that the jury "had the opinion of medical men of undoubted integrity and whose qualifications none would question": but "they also had the facts and the undisputed facts of all the surrounding circumstances."

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[5] For the appellant: *J. A. Grieves, Q.C., H. A. Skinner* (instructed by Mr. A. N. Headley Hinckley). For the Crown: *Mrs. E. Lane, Q.C., J. R. Bickford Smith* (instructed by Director of Public Prosecutions).

Matheson and the present case might be technically reconcilable with *Rivett* on the ground that in the two later cases the court could find no evidence of any such facts or circumstances as were said to exist in *Rivett*, which could displace or throw doubt on the unchallenged evidence; but it is thought that the trend of the cases shows that the courts are requiring juries to place greater reliance on the medical evidence.

Murder—automatism and insanity as alternative defences—burden of proof

Bratty v. Attorney-General for Northern Ireland

House of Lords: Viscount Kilmuir L.C., Lords Tucker, Denning, Morris of Borth-y-Gest and Hodson: September 4, 5, 6 and October 3, 1961: [1961] 3 W.L.R. 965.[6]

B. was convicted at assizes in Northern Ireland of the murder by strangulation of an eighteen-year-old girl. In a statement made to the police, B. said that when he was with the girl he had a "terrible feeling" and that a "sort of blackness" came over him, but nevertheless, he was able to give some account of what had occurred. In evidence at the trial, B. described the terrible feeling that came over him as a feeling that he wanted to put his arms round the girl. The defence raised the issue of insanity, namely that B. was suffering from an attack of psychomotor epilepsy and as a result had such a defect of reason as not to know the nature and quality of his acts, or, if he did, not to know that they were wrong. However, the defence at the trial asked the jury to find "one of three separate and completely independent verdicts." The three verdicts suggested were: (1) a verdict of not guilty, on the basis that B. "was not master of the situation but that he was in a state of automatism" the cause being psychomotor epilepsy. (2) A verdict of manslaughter, on the basis that B. was incapable of forming the particular intent necessary to constitute murder, that is, an intent to kill or cause grievous bodily harm, on the ground that "his mental condition was so impaired and confused and he was so deficient in reason that he was not capable of forming this intent." (3) A verdict of guilty but insane, on the basis that B. did not know the nature and quality of his acts, or, if he did, that he did not know that they were wrong. The trial judge left the defence of insanity to the jury, but refused so to leave the first and second defences. The jury rejected the defence of insanity, and convicted B. of murder. B. appealed to the Court of Criminal Appeal in Northern Ireland on the main grounds that the trial judge ought to have left the defences of automatism and manslaughter to the jury. The appeal was dismissed and B. appealed to the House of Lords.

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[6] For the appellant: *B. Kelly, Q.C., R. Ferguson* (instructed by Prothero & Prothero for David H. Smyth, Newtownares, Co. Down). For the Crown: *W. Brian Maginess, Q.C., Att.-Gen., C. A. Nicholson, Q.C., R. J. Babington* (instructed by Linklaters & Paines for Richard F. Sheldon, Chief Crown Solicitor in Northern Ireland).

Held, dismissing the appeal, that in some cases a defence of insanity and a defence of automatism (*i.e.*, that the act was unconscious and involuntary) might be raised. For example, it might be alleged that the accused had a blow on the head, after which he acted without being conscious of what he was doing, or was a sleep-walker. That might lead to a divergence of view as to whether there was a defect of reason from a disease of the mind (*cf. R.* v. *Kemp* [1957] 1 Q.B. 399) or that the prisoner did not know what he was doing. But where, as here, the only cause alleged for the "unconscious" act in question was a defect of reason from disease of the mind, namely, psychomotor epilepsy, and that cause was rejected by the jury, there could be no room for the alternative defence of automatism. The trial judge was not bound to leave the defence of automatism to the jury unless the necessary foundation had been laid by positive evidence, which properly considered, was evidence of something other than a defect of reason from disease of the mind. Whether or not there was a proper foundation was a question of law for the judge to decide. If the trial judge in the present case was justified in holding the defence of automatism from the jury, it followed that B. must be deemed to have been a sane and responsible person at the time of the killing. There were no grounds for the view that he lacked an intent to kill or cause grievous bodily harm to the deceased, and therefore, there was no issue of manslaughter to be left to the jury. In the circumstances, if the act of killing was an involuntary act, as the defence suggested, the evidence attributed it solely to a disease of the mind and the only defence open was the defence of insanity. Accordingly, the trial judge was right in leaving only the defence of insanity to the jury and the appeal should be dismissed. [H. P.]

Commentary. The M'Naghten Rules laid it down that "every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to [the jury's] satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved, etc." It seems from these words that the judges were intending to put the burden of proof of insanity squarely on the accused; and so it has always been held: *R.* v. *Stokes* (1848) 3 C. & K. 185; *R.* v. *Layton* (1849) 4 Cox 149; *R.* v. *Smith* (1910) 6 Cr.App.R. 19; *R.* v. *Coelho* (1914) 30 T.L.R. 535.

In *Woolmington* v. *D. P. P.* [1935] A.C. 462, it was said that insanity is the one exception at common law to the rule that it is the duty of the prosecution to prove the prisoner's guilt in all particulars. While he does not have to satisfy the strict standard of proof beyond reasonable doubt which rests on the prosecution, it has been consistently held that he must prove his case on a balance of probabilities, *i.e.*, the standard of proof which rests on the plaintiff in a civil action: *Sodeman* v. *R.* [1936] 2 All E.R. 1138. If the jury think it is more likely than not that he is insane within the meaning of the M'Naghten Rules, then he is entitled to a verdict of acquittal.

When, however, consideration is given to what has to be proved to establish insanity under the first limb of the Rules, there is an apparent conflict with the general rule in *Woolmington* requiring the prosecution to prove the whole of its case, including any *mens rea* which is included in the definition of the crime. In effect this means that the prosecution must prove, in a crime requiring *mens rea*, that the accused was either intentional or reckless with respect to all those consequences and circumstances of his act which are necessary constituents of the *actus reus* of the crime with which he is charged. This, in effect, is to prove that the accused knew the nature and quality of his act. Yet in order to establish insanity under the first limb of the Rules the accused is apparently required to prove that he did *not* know the nature and quality of his act. The general rule says that the prosecution must prove these facts; the special rule relating to insanity says that the defence must prove the same facts. One of these propositions must be inaccurate. The present case seems to decide that it is the general rule which must give way. The somewhat startling result is that the prosecution are required to prove *mens rea* in all cases—except where the prisoner raises the defence of insanity, when he must prove that he had no *mens rea*.

In the present case the jury may have concluded that it was just as likely as not that the accused, because of a defect of reason arising from disease of mind, did not know the nature and quality of his act. In that case, the judge's direction required them to reject the defence of insanity and convict him. Yet, if this was so, they had much more than a reasonable doubt whether he was guilty of murder. It was accepted in the present case that if the defence was automatism not arising from insanity, the jury should acquit unless satisfied beyond reasonable doubt that the accused did know the nature and quality of his act. This was made perfectly clear by Viscount Kilmuir and Lords Denning and Morris. If the defence was that, because of concussion or sleepwalking, the accused did not know the nature and quality of his act and the jury found that the evidence was exactly evenly balanced, or even if they were satisfied on a balance of probabilities that he *did* know this, they must acquit. This, surely, is an utterly indefensible anomaly. What possible reason is there for discriminating in this way against the man whose disability arises from a disease of mind? Why should he be convicted—and perhaps hanged or sent to prison for life—while another who did the same act with precisely the same state of mind should be acquitted entirely?

Viscount Kilmuir said: "Where the possibility of an unconscious act depends on, and only on, the existence of defect of reason from disease of the mind within the M'Naghten Rules, a rejection by the jury of this defence of insanity necessarily implies that they reject the possibility." With respect, this necessary implication cannot be drawn. The most that can be deduced from the jury's rejection of the defence of insanity, where they have been directed in accordance with the current practice, is that they reject the *probability*. They may well have thought that there was a reasonable possibility or, as pointed out above, an even chance of an unconscious act; yet, if they did as they were told, they would convict.

Viscount Kilmuir also said: ". . . one must not lose sight of the overriding principle, laid down by this House in *Wollmington's* case, that it is for the prosecution to prove every element of the offence charged. One of these elements is the accused's state of mind: normally the presumption of mental capacity is sufficient to prove that he acted consciously and voluntarily and the prosecution need go no further. But, if, after considering evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary *mens rea*—if indeed the *actus reus*—has not been proved beyond reasonable doubt." This, with respect, is an admirable statement of the law: but why should it not apply when the defence is insanity? Why, when the accused's defence involves a disease of the mind do we lose sight (as this case decides we do) of the "overriding principle" so that the accused may be convicted where "the necessary *mens rea*—if indeed the *actus reus*—has not been proved beyond reasonable doubt"? The only answer, it would seem, is that the cases unanimously state that the burden of proof of insanity is on the prisoner. None of these cases, however, was binding on the House of Lords. It is well known that the House is very reluctant to overrule a long-established and generally accepted rule of law, even where there is no decision which technically binds the House. But surely a more liberal approach might properly be adopted in criminal appeals where the very object of the appeal is to clarify some point of law of general public importance. After all, the Court of Criminal Appeal has even assumed power to overrule its own decisions in favour of the liberty of the subject: *R.* v. *Taylor* [1950] 2 K.B. 368. Moreover, it is not unreasonable to regard with suspicion any case decided before *Woolmington* which holds that there is a burden of proof on the accused; for it will be recalled that in that case the House, in holding that the burden of disproving the defence of accident was on the Crown, overruled strong authority, notably Foster's *Crown Law*, which had been relied on in the courts below. It is true that Lord Sankey expressly stated that insanity was an exception to the general rule: but this was an *obiter dictum* and it was not brought to his attention that (so far as the first limb of the M'Naghten Rules is concerned) this flatly contradicted the fundamental proposition that the prosecution must prove that the prisoner has the necessary *mens rea*. It was not impossible for the House in the present case to hold that the rule putting the burden on the prisoner was inconsistent with the decision in *Woolmington* and to overrule the cases which so held. Alternatively, though less satisfactorily, it might have been held that the rule putting the onus on the prisoner is restricted to cases where he relies on the second limb of the Rules (that he did not know that his act was wrong) where there is no conflict with the proposition that the Crown must prove *mens rea.*

It would be both just and logical that the same rule should apply both to insanity and to automatism arising otherwise than through insanity—*i.e.*, that the prisoner should have the onus of introducing evidence of insanity or automatism, fit for the jury's consideration; and that once he has done this, the jury should be directed not to convict unless satisfied beyond reasonable doubt that he was not insane or in a state of automatism, as the case may be. To distinguish between the defences, as the present case does, is both illogical and unjust.

For an invaluable discussion of these problems, see Glanville Williams, *The Criminal Law* (*The General Part*) (2nd ed.), § 165.

Special verdict—jurisdiction to entertain an appeal from

R. v. Duke

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Veale JJ.: October 9, 1961: *The Times*, October 10, 1961. House of Lords: Lords Morris of Borth-y-Gest, Tucker and Devlin: October 20, 1961: 105 S.J. 891.

D. was charged at the Central Criminal Court with capital murder. The verdict returned by the jury was " guilty of manslaughter but insane, not guilty of capital murder." The court record showed the verdict to be " guilty of the act charged but insane at the time of commission." On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that the appellant was faced with the initial question of jurisdiction. Section 3 of the Criminal Appeal Act, 1907, gave a right of appeal to persons " convicted on indictment." In *R.* v. *Felstead* [1914] A.C. 534, the House of Lords held that a special verdict, such as the present, was an acquittal and, accordingly, this court had no jurisdiction to entertain an appeal. A special verdict was indivisible, so that it could not be successfully argued that an appeal lay against the finding of guilt only. Furthermore, an appeal did not lie by way of case stated: *R.* v. *Taylor* (1915) 11 Cr.App.R. 198. It had been the experience of this court that the fact that no appeal was possible from a special verdict

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[7] For the appellant: *Derek Wheatley* (instructed by Mr. J. C. Clifford Watts). For the Crown: *Mervyn Griffith-Jones* (instructed by the Director of Public Prosecutions). In the House of Lords *Derek Wheatley* was instructed by the Official Solicitor and *Alastair Morton* appeared for the Crown.

might work an injustice. In particular, cases arose under the Homicide Act, 1957, where the defendant put forward the defence of diminished responsibility rather than the defence of insanity. In such cases, there was a real conflict of practice as to whether the prosecution could say or call evidence that the prisoner's condition went beyond diminished responsibility. So far as this case was concerned, the question was covered by *Felstead's* case, but this court wished to emphasise the words of Lord Reading in that case, that the matter was one for the legislature.

D.'s petition for leave to appeal to the House of Lords was dismissed without any reasons being stated. [H. P.]

Commentary. Before 1800, if the jury found the accused person to have been insane when he committed the act, he was simply acquitted and went entirely free. By the Criminal Lunatics Act of that year the jury were required to find a special verdict where they acquitted the prisoner on the ground of insanity, and the court was empowered to order his detention during His Majesty's pleasure. The present form of verdict was introduced by the Trial of Lunatics Act, 1883, apparently at the insistence of Queen Victoria: see [1954] Crim.L.R. at 676. This Act made no difference of substance but says that the jury shall find the accused guilty, not of the offence, but of an act which would have been the offence if the accused had been sane at the time. Thus the House decided in *Felstead* that " the verdict is one and indivisible by reason of the statutory provision and takes the place of the general verdict of 'Not Guilty,' and is a verdict of acquittal of the accused."

The Royal Commission on Capital Punishment (Cmd. 8932, para. 458) endorsed the view of the Atkin Committee (Cmd. 2005, pp. 11–12) that the form of the verdict is unsatisfactory, since " the word 'guilty' in criminal trials should connote only criminality, the commission of a crime—the very thing which on the finding as to the accused's state of mind is negatived."

The criticism made in the present case, however, relates not merely to form but to substance. The point was forcefully made by Sir Patrick Devlin in [1954] Crim.L.R. at 677:

" 'Suppose,' Lord Parker said in the course of the argument in *Felstead* v. *R.*, at p. 538, 'there is no evidence of crime but evidence of insanity and the jury find the accused guilty but insane?' The Attorney-General answered that that raised a question of policy, not of construction of the Act: if that means anything, it means that it was the policy of the legislature that an insane person against whom there was no evidence of a crime should be subject to indefinite detention as a criminal lunatic. If the defence of an admitted lunatic was that he was ten miles away from the scene of the crime, a complaint that his defence had not been properly put to the jury could not be heard and determined by any court of law."

The difficulty has been aggravated since the Homicide Act for, according to *R.* v. *Bastian* (1958) 42 Cr.App.R. 75, where the accused sets up the defence of diminished responsibility the prosecution is entitled to cross-examine and to call evidence to prove that he is insane. If the prosecution prevails, there is no appeal. See the editorial comment at [1961] Crim.L.R. 507.

INDECENT ASSAULT

Evidence of—corroboration—further evidence on appeal

See R. *v.* PARKS, above, p. 825.

PROCEDURE

Special verdict—appeal from

See R. *v.* DUKE, above, p. 833.

ROAD TRAFFIC

Driving at a dangerous speed—necessity for potential danger

Tribe v. Jones

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Veale JJ.: *The Times*, October 20, 1961.[8]

J. drove his car along a road which was subject to a 30 m.p.h. speed limit at speeds which varied between 45 and 65 m.p.h. The road was deserted apart from some cyclists and one car which passed in the opposite direction. It was a wide, straight and fast road, bounded by common land for most of its length. J. achieved his maximum speed when passing an insignificant turning and slowed down to the minimum speed at a more important cross-roads; he passed eight junctions, being at all times on the major road and at each turning had a clear view up the road. The road was damp.

J. was charged with driving at a speed dangerous to the public, contrary to section 2 (1) of the Road Traffic Act, 1960. The justices found that no person or vehicle was in danger, and further found that there was no potential danger to other road users other than that inherently present when any car was driven on a road unlawfully, having regard to the time of day (7.20 a.m.) and year (November). They dismissed the summons and the prosecutor appealed.

Held, distinguishing *Baker* v. *Williams* (1956) 54 L.G.R. 197; [1956] Crim.L.R. 204, that the justices had directed their minds to the proper circumstances and potential danger, that a fast speed exceeding 30 m.p.h. was not necessarily dangerous, and that the appeal would be dismissed. [D. C.]

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[8] For the prosecutor: *Paul Wrightson* (instructed by Sharpe, Pritchard & Co. for A. N. Schofield, Southampton). J. did not appear and was not represented.

Commentary. In *Bracegirdle* v. *Oxley* [1947] 1 K.B. 349, Lord Goddard C.J. said, " there are many cases, apart from any question of danger to the surface of the road, in which it would be perfectly safe to drive a heavy vehicle at almost any speed." It appears from that case, however, that, in appropriate circumstances, the excessive speed may be the only characteristic of the manner of the accused's driving which departs from the standard of the prudent and reasonable driver and yet he may be convicted. In other words, speed, in the particular circumstances, may amount to dangerous driving. Humphreys J. said: " He may be convicted because he is driving too fast and only because he is driving too fast, but, of course, there must be taken into consideration all the circumstances of the case, because a speed which is too fast on one road in certain circumstances may not be dangerous when driving on another road in other circumstances." In that case the court held, taking into account the nature of the road, that the only conclusion that could reasonably be drawn was that the speed was dangerous to the public and the justices were directed to convict. Comparisons of cases may not be very profitable because so much depends on the particular facts of each case; but the court appears to have taken a rather more generous view of the facts than the court in *Bracegirdle* v. *Oxley*. *Baker* v. *Williams* is more clearly distinguishable because there the defendant executed the dangerous manoeuvre of overtaking a fast car which was itself overtaking a bus. See also *Johnstone* v. *Hawkins* [1959] Crim.L.R. 459.

TRIAL

Indictment—separate trials—quashing of count added after committal

R. v. Hemmings and others

Central Criminal Court, The Recorder of London, September 18–22, 1961.[9]

In an indictment containing 17 counts charging 10 persons with larceny and receiving, all the defendants, except two, confessed to counts acceptable to the prosecution. In count 3 Ilbury was charged with larceny and in counts 4 and 5 Tizard and Ruxton were charged separately with receiving different parts of the same property. In counts 6 and 13 Ilbury was charged with larceny and in counts 9 and 10 and 14 and 15 Tizard and Ruxton were charged separately with receiving identical parts of the relevant property.

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[9] For the prosecution: *E. J. P. Cussen* and *J. Mathew* (instructed by the Director of Public Prosecutions). For the defendants: *C. L. Hawser, Q.C.* and *I. S. Richard* (instructed by T. W. James and Wheater), *Waley* and *Lowry* (instructed by Reginald Johnson & Co.), *W. Hemming* (instructed by Ferris & Read), *Sheer* (instructed by Hoare, Erzall & Freeman), *J. Lloyd-Eley* (instructed by James H. Fellowes), *E. Clarke, Q.C.* and *W. M. F. Hudson* (instructed by Dale and Newbury), *V. Durand, Q.C.* and *H. Lester* (instructed by Benson Maguire & Co.).

Ilbury confessed, while Tizard and Ruxton pleaded not guilty, to all these counts. On behalf of Tizard Mr. E. Clarke, Q.C., moving for separate trials of Tizard and Ruxton on counts 4 and 5 and 14 and 15 and that count 9 be quashed, stated that as the two defendants were charged with receiving different parts of the property stolen, section 40 (3), Larceny Act, 1916, did not apply to counts 4 and 5 and the fact that the thief, having pleaded guilty, was no longer to be tried removed the nexus between the two receivers, who consequently could not be tried together. As regards counts 14 and 15, Mr. Clarke said that section 40 of the Larceny Act did apply and that as there had been a committal on these counts there was no power to quash on the ground that there was no evidence disclosed against Tizard, but the fact that the depositions disclosed no evidence against Tizard while there was a case against Ruxton necessitated a separate trial for Tizard in order that he should not be prejudiced by the evidence against Ruxton, such separate trial should end in a ruling of no case to answer on a defence submission at the close of the case for the prosecution. As regards count 9, counsel pointed out that counts 9 and 10 had been added after committal and the only evidence that could possibly implicate Tizard was his remark when the statement of Ilbury was read to him in response to his " Read it to me. I like fairy stories " following several jocular remarks such as " Have you seen any good plays recently." Tizard's reply to the statement was " I see you have beaten the truth out of him. I will take my chance with one of you but not all of you, etc." If this reply let in the statement, Ilbury was not to be called by the prosecution, Tizard would be greatly prejudiced by much in the statement not relevant to the indictment. Mr. Cussen in reply relied upon *Archbold*, para. 2084, the Indictment Rules and *R.* v. *Lee* [1958] Crim. L.R. 247.

Held, Tizard and Ruxton should be tried together on counts 4 and 5 while count 9 would be quashed.

Note: The prosecution decided to offer no evidence on count 14 and it was not proceeded with, without Tizard being put in charge of the jury in respect of it. [C. B. Orr.]

Commentary. Section 40 (3) of the Larceny Act, 1916, provides: " In an indictment for feloniously receiving any property under this Act any number of persons who have at different times so received such property or any part thereof may be charged and tried together." The acquittal of the thief would seem to have no effect on whether the receipt by two persons of different parts of the stolen property amounted to a receipt of " any part " of the stolen property within the meaning of the Act.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Abortion

In R. *v.* COSTI the court (Lord Parker C.J., Ashworth and Veale JJ.: October 23, 1961) upheld a sentence of three years' imprisonment for using an instrument with intent to procure a miscarriage. The trial judge passed the sentence on the basis that the appellant was carrying on practice as an abortionist for money. The appellant was a woman of twenty-five years of age with no previous convictions. Lord Parker C.J., giving judgment, said that there was evidence to support the basis on which the trial judge had imposed this sentence, namely that the appellant was a professional abortionist. Accordingly, there was nothing wrong in principle with the sentence of three years' imprisonment.

Assault on police

In R. *v.* DONOHUE the court (Lord Parker C.J., Ashworth and Veale JJ.: October 23, 1961) increased a sentence of twelve months' imprisonment for assault on a police constable to one of two years' imprisonment. The appellant had been sentenced to six months, twelve months and nine months imprisonment for offences of being found by night in a building with intent to steal, assaulting a police constable in the execution of his duty and possessing a housebreaking implement by night. Lord Parker C.J., giving judgment, said that the appellant was a man of thirty-eight years of age who had four previous convictions for violence. It was clearly a case where a sentence of twelve months' imprisonment for assault on the police was, in the opinion of the court, insufficient, particularly in view of the appellant's record. The police had to be protected and, accordingly, the sentence would be increased to one of two years' imprisonment, consecutive, making three years and three months' imprisonment in all.

Attempted burglary

In R. *v.* PARTRIDGE the court (Ashworth, Veale and Elwes JJ.: October 27, 1961) reduced a sentence of eight years' preventive detention for attempted burglary to one of four years' imprisonment in the case of a man of thirty-one years of age whose longest previous sentence was three years' imprisonment.

Conspiracy to defraud

In R. *v*. DAVIS the court (Gorman, Stevenson and Megaw JJ.: October 9, 1961) confirmed a sentence of a fine of £500 for conspiracy to defraud but reduced the appellant's liability to pay costs from £952 to £400. Gorman J., giving judgment, said that this court had given most anxious consideration to the question whether the appellant should be permitted to appeal out of time. There had been delay from January 11, 1961, to June 22, 1961. The explanation put forward was that the appellant had mistakenly made a petition to the Home Secretary in respect of the costs. It had been pointed out that the taxed costs of £952 were almost twice as much as the fine imposed. In all the circumstances, this court felt that it was right to grant the necessary extension of time and to reduce the amount of costs for which the defendant was liable to the sum of £400.

Dangerous driving

In R. *v*. THOMAS the court (Glyn-Jones, Elwes and Widgery JJ.: October 30, 1961) reduced a sentence of eighteen months' imprisonment to one of six months' imprisonment. The court, however, upheld a disqualification for a period of ten years in view of the appellant's very bad record. The facts were that the appellant had been stopped by police officers for exceeding the speed limit. He was then offensive to the officers and threatened to report them to their superiors and proceeded to drive on. The police officers followed him for a distance of some three miles, and in the course of that journey the appellant carried out various manoeuvres, such as braking violently and travelling three times round a roundabout, with the apparent purpose of irritating the police officers. Widgery J., giving judgment, said that where acts found to be dangerous were committed deliberately and not in a moment of aberration or as a result of an error of judgment, that in itself was a factor which might render the offence more serious. The fact that the appellant had driven a distance of three miles in what was probably a bad temper, and intending deliberately to score off another vehicle on the road (whether that vehicle was a police car or not) was a serious case of dangerous driving. However, this court considered that the sentence imposed might have been influenced by the appellant's attitude towards authority in general and the police in particular. The fact that the appellant was acting in an entirely disrespectful manner towards authority was not of itself a ground for increasing a sentence for dangerous driving. In the opinion of this court the sentence of eighteen months' imprisonment was wrong in principle and the appropriate sentence was one of six months.

False pretences

In R. *v.* DE LAWNAY the court (Slade, Glyn-Jones and Thompson JJ.: October 13, 1961) reduced a sentence of three years' imprisonment for offences of false pretences and fraudulent conversion to one of eighteen months' imprisonment. Glyn-Jones J., giving judgment, said that the appellant had kept out of trouble from offences of dishonesty for a period of some twelve years. During that time there had been convictions for sexual offences, one of indecent assault on a girl, three of carnal knowledge of girls under sixteen and occasions when he was fined for indecent exposure. This court proposed to consider what would be the proper sentence for the present offence, disregarding the appellant's convictions for sexual offences; but it must be understood that this court did not as a general rule assent to the proposition that previous convictions of a different nature should be disregarded. Every case had to be determined on its own merits. The appropriate sentence was one of eighteen months' imprisonment.

Housebreaking

In R. *v.* CLARENCE the court (Slade, Glyn-Jones and Thompson JJ.: October 13, 1961) varied a sentence of four years' corrective training for housebreaking to one of four years' imprisonment where the prison commissioners reported the appellant as unsuitable for corrective training. The fact that the appellant had passed his G.C.E. during his last period of imprisonment did not make it an exceptional case within the rule laid down by this court in *R.* v. *Murray* (1950) 34 Cr.App.R& 203, and *R.* v. *Shepherd* (1950) 34 Cr.App.R. 236. Slade J., giving judgment, said that this court had said over and over again that a man ought not to be sentenced to corrective training when the prison commissioners had reported that he was unsuitable for it.

In R. *v.* FARRAR the court (Lord Parker C.J., Ashworth and Veale JJ.: October 13, 1961) reduced a sentence of nine years' preventive detention for housebreaking to one of five years' imprisonment in the case of a man of forty-three years of age with a very bad record who had already served a sentence of seven years' preventive detention but who had worked steadily for twenty-two months since his last release from prison. Lord Parker C.J., giving judgment, said that it was wrong to impose another sentence of preventive detention when a man had obviously tried to work and to go straight and had succeeded in doing so for twenty-two months.

In R. *v*. GARRIGAN the court (Lord Parker C.J., Ashworth and Veale JJ.: October 13, 1961) increased sentences of eighteen months and eighteen months concurrent for a total of eleven offences (including offences taken into consideration) to sentences of eighteen months and eighteen months' consecutive. Lord Parker C.J., giving judgment, said that this court had stated in the last few days that they would not hesitate in appropriate cases to increase sentences when they felt that they were insufficient. This court was quite satisfied that the sentence of eighteen months in the present case was insufficient. In particular the last offence of housebreaking was committed by the appellant when on bail, which was a serious matter. The total of eleven offences included four housebreakings and the appropriate sentence was a total of three years' imprisonment.

In R. *v*. THORNTON the court (Lord Parker C.J., Ashworth and Veale JJ.: October 23, 1961) increased a sentence of two years' imprisonment for three breaking offences (with eighteen other offences taken into consideration) to one of three years' imprisonment on the ground that two years was quite inadequate in the circumstances of the case. Lord Parker C.J., giving judgment, said that this had been an absolute orgy of offences and that the appropriate sentence was one of three years' imprisonment. Dealing with the appellant's record, Lord Parker pointed out that, having committed an offence whilst on probation, he was sentenced by the justices to three months' imprisonment for the offence in question and three months' imprisonment concurrent for the original offence for which he had been put on probation. Lord Parker said that the court was quite clearly of the opinion that the appellant ought to have been sentenced consecutively for the offence which constituted the breach of probation.

Housebreaking and larceny

In R. *v*. BRENNAN the court (Streatfeild, Hinchcliffe and Elwes JJ.: September 20, 1961) reduced a sentence of seven years' preventive detention for housebreaking and larceny to one of eighteen months' inmprisonment in the case of a man of thirty-seven years of age with fourteen previous convictions who had made a real effort to go straight for thirteen months and then committed one isolated offence.

Larceny

In R. *v.* LAYTON the court (Lord Parker C.J., Ashworth and Veale JJ.: October 9, 1961) varied a sentence of five years' preventive detention for larceny to five years' imprisonment on the ground that five years' preventive detention was an improper sentence except in very special circumstances, for example, in the case of a very old man. Lord Parker C.J., giving judgment, said that the appellant was only thirty-eight years of age and, although he clearly qualified for preventive detention, this court had said on many occasions that five years was an improper sentence of preventive detention except in very special circumstances, as, for instance, an old man who might die in prison. Accordingly, the sentence would be varied to one of five years' imprisonment.

Larceny as bailee

In R. *v.* CROKER the court (Ashworth, Stevenson and Widgery JJ.: October 5, 1961) varied a sentence of a fine of £3,000 for larceny as bailee (selling a motor-car on hire-purchase without the consent of the finance company) to a bind-over for three years. Ashworth J. giving judgment, said that the appellant was until recently in quite a considerable way of business in the motor trade. However, as a result of the recession in the motor trade, he had run into grave financial difficulties. Any penalty or other financial obligation imposed by the court must take into account the appellant's ability to pay. There was no suggestion here that the appellant had assets tucked away or that he was in any position to pay the fine. There had to be a penalty and this court proposed to bind over the appellant for three years to be of good behaviour and to make an order that he should pay a sum not exceeding £150 towards the costs of the prosecution.

Manslaughter

In R. *v.* JAMES the court (Slade, Glyn-Jones and Thompson JJ.: October 13, 1961) varied a sentence of imprisonment for manslaughter to a hospital order under section 60 of the Mental Health Act, 1959. Glyn-Jones J., giving judgment, said that the appellant had been tried for the murder of her infant child, a boy of about six years of age. At the trial there was unchallenged evidence from two medical men that she was suffering from mental illness whereby her responsibility for her act was greatly diminished. The verdict was manslaughter on the ground of diminished responsibility. In fact the Secretary of State had now made an order under section 72 of the Mental Health Act, 1959, transferring the appellant from prison to a mental hospital. In one sense, therefore, it might be said that nothing done by this court would be effective. On the other hand, the medical evidence was that the appellant's condition was susceptible to treatment with good hope of complete recovery. Further, on the facts, there were no grounds on which it could be said that the appellant deserved punishment, notwithstanding her mental condition. This court thought it right to substitute for the sentence of imprisonment a hospital order directing her to be received for treatment (together with a restriction order under section 65 of the Act without limit) so that the appellant should be spared the stigma of living the rest of her life having been sentenced to imprisonment for taking the life of her own child.

Murder

In R. *v.* JONES (No. 2) the court (Ashworth, Salmon and Winn JJ.: October 4, 1961) upheld a sentence of life imprisonment for murder consecutive to a previous sentence of fourteen years' imprisonment for rape. Ashworth J., giving judgment, said that it had been contended that the form of the sentence was wrong in principle, in that it amounted to a " sentence of life imprisonment less the unremitted portion of the sentence of fourteen years." Further, it had been contended that the learned judge was in error in supposing that, if the sentence of life imprisonment were made to take effect at once, the sentence of fourteen years would merge with it and for practical purposes ceased to operate. The court had been assisted on this point by the Attorney-General as *amicus curiae* and he had assured the court that the two sentences would not merge, if the life sentence were made concurrent, and that the sentence of fourteen years would not be affected in any way. According to him, there was no practical difference whatever between a life sentence made concurrent and one made consecutive, but he submitted the view that it was undesirable to make the life sentence consecutive since it achieved no practical result. This court had no doubt that the learned judge had power to make the life sentence consecutive to the earlier sentence of fourteen years, but the court accepted the Attorney-General's submission that a consecutive sentence was undesirable. Since the practical result would be the same in any event, the court could see no reason to allow the appeal against sentence.

Rape

In R. *v.* MACHIN the court (Lord Parker C.J., Slade and Veale JJ.: October 3, 1961) upheld a sentence of six years imprisonment for rape. Lord Parker C.J., giving judgment, said that the appellant was a young man of 21 years of age with virtually a clean record. However, single women must be protected against disgraceful assaults of this kind, which were all too prevalent in this country today. An exemplary sentence was required in order to deter other young men from similar offences and, accordingly, there was nothing wrong in principle with the sentence of six years.

Robbery with violence

In R. *v.* STEWART the court (Lord Parker C.J., Ashworth and Veale JJ.: October 23, 1961) upheld a sentence of three years' imprisonment passed upon a boy of sixteen years of age for robbery with violence (beating up two elderly women in a sub-post office, using a hammer). Lord Parker C.J., giving judgment, said that the court had given this case very anxious consideration. They were quite prepared to accept the view that the appellant was unlikely to commit a similar offence again, so that the best course, from the appellant's point of view, would be for him to continue his education and to receive some disciplinary training. However, a substantial period of imprisonment was the only appropriate penalty in order to show young men that they could not commit this kind of offence with impunity. Accordingly, the sentence of three years' imprisonment would stand.

Sexual offences

In R. *v.* WRIGHT the court (Lord Parker C.J., Ashworth and Veale JJ.: October 9, 1961) upheld sentences totalling ten years' imprisonment for sexual offences passed upon a man of thirty-two years of age with no previous convictions. Lord Parker C.J., giving judgment, said that the appellant had pleaded guilty to an orgy of sexual offences, including incitement to gross indecency (inciting his step-daughter aged ten years to indecent assault) buggery of his step-daughter aged ten years, sexual intercourse with a girl of fourteen years and buggery of his wife. He had been sentenced to eight years' imprisonment for the buggery and two years on the other counts concurrent, but consecutive to the eight years, making ten years in all. This court had given very anxious consideration to this case but had concluded that there was no real ground for interfering with the sentence.

Shooting with intent

In R. *v.* EASON the court (Lord Parker C.J., Ashworth and Veale JJ.: October 23, 1961) increased a sentence of thirty months' imprisonment for shooting with intent to do grievous bodily harm to one of four years' imprisonment. The appellant was a man of thirty-seven years of age with virtually a clean record. The offence was committed when a young girl of twenty years of age broke off her association with the appellant. The appellant shot at her with a shot-gun, causing multiple wounds to her legs. Lord Parker C.J., giving judgment, said that the sentence of thirty months' imprisonment for the present offence was grossly inadequate. The appropriate sentence was one of four years' imprisonment.

Shopbreaking

In R. *v.* BROWN the court (Ashworth, Stevenson and Widgery JJ.: October 6, 1961) varied a sentence of borstal training to one of three years' imprisonment in the case of a young man of twenty years of age who had served one previous term of borstal training (and had later been recalled for another offence) and where the prison commissioners had expressed the opinion that further borstal training was unlikely to be of advantage to him.

In R. *v.* CAIRNS the court (Lord Parker C.J., Ashworth and Veale JJ.: October 9, 1961) reduced a sentence of eight years' preventive detention for shopbreaking and larceny to one of five years' imprisonment. Lord Parker C.J., giving judgment, said that this court was loath to allow a sentence of eight years' preventive detention to stand on a man who was no more than thirty years of age and who apparently had at one time managed to keep out of trouble. This court was prepared to give him a further chance and the appropriate sentence was one of five years' imprisonment.

In R. *v.* TALBOT the court (Lord Parker C.J., Ashworth and Veale JJ.: October 30, 1961) reduced a sentence of eight years' preventive detention for shopbreaking and other offences to one of seven years' imprisonment in the case of a man of thirty-four years of age with two gaps in his criminal record.

Storebreaking

In R. *v.* TODD the court (Lord Parker C.J., Ashworth and Veale JJ.: October 23, 1961) reduced a sentence of two years' corrective training for storebreaking and larceny to one of eighteen months' imprisonment in the case of a man of twenty-nine years of age with five previous convictions who, however, had been free of trouble for six years, married, settled down and was working satisfactorily. In those circumstances, the court felt that a sentence of corrective training was inappropriate in his case.

Wounding with intent

In R. *v.* NORMAN the court (Lord Parker C.J., Ashworth and Veale JJ.: October 30, 1961) varied a sentence of two years' imprisonment for wounding with intent to do grievous bodily harm to a hospital order and restriction order for three years in the case of an epileptic who required long-term medical treatment. Lord Parker C.J., giving judgment, said that the trial judge had felt that the appellant could have such treatment as was necessary in prison and had refused to make a hospital order under the Mental Health Act, 1959. Evidence had been given at the trial that the appellant was suffering from epilepsy and required treatment. The doctors were satisfied that the appellant would co-operate and said that he might require a long treatment. This court had come to the conclusion that this was a clear case for applying the provisions of the Mental Health Act. Accordingly, this court would make a hospital order together with a restriction order for three years.

Acts and Orders *

Animals

The Slaughter of Animals (Prevention of Cruelty) Regulations, 1958 (S.I. 1958, No. 2166), which otherwise came into operation on January 1, 1958, provided for the deferment of certain requirements relating to the construction, layout and equipment of existing slaughterhouses until such later dates as the Minister might appoint. This Order specifies October 1, 1961, as the date on which such provisions came into force in a large number of local authority areas specified in the Schedule. SLAUGHTER OF ANIMALS (PREVENTION OF CRUELTY) REGULATIONS (APPOINTED DAY—NO. 3) ORDER, 1961 (S.I. No. 1816) (3d.).

See also under **Food and Drugs,** below, p. 848.

Armed Forces

Section 116 of the Naval Discipline Act, 1957, empowers Her Majesty by Order in Council to direct that members of any naval force of a Commonwealth country or raised by any colony shall be subject to that Act so far as it relates to the offences of desertion or absence without leave, and to the arrest, trial and punishment of persons who have committed or are suspected of committing either of those offences. Previous Orders have already been made relating to the Royal Australian Navy, the Royal Ceylon Navy, the Ghana Navy and the Pakistan Navy. This Order now adds the Indian Navy. Operative October 2, 1961. NAVAL DISCIPLINE (COMMONWEALTH NAVIES) (AMENDMENT) (NO. 2) ORDER, 1961 (S.I. No. 1828) (2d.).

The Certificates of Arrest and Surrender of Deserters and Absentees (Air Force) Regulations, 1956 (S.I. 1956, No. 580) are amended by substituting a new and shorter form of certificate which must be handed over with an absentee or deserter from the Air Force when he is delivered into Air Force custody as a result of proceedings before a court of summary jurisdiction. The new form provides, in conformity with section 30 of the Army and Air Force Act, 1961, for clerks of courts to sign such certificates as well as, in general, justices of the peace. Operative January 1, 1962. CERTIFICATES OF ARREST AND SURRENDER OF DESERTERS AND

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* Prepared by F. Maurice Drake, Barrister-at-Law.

ABSENTEES (AIR FORCE) (AMENDMENT) REGULATIONS, 1961 (S.I. No. 1837) (3d.).

Food and Drugs

Restrictions are placed on the amount of lead which may be present in food (including drink) intended for sale for human consumption. Varied limits are applied to certain specified foods, and other foods are subject to a maximum content of 2·0 parts per million of lead. The Food Standards (Edible Gelatine) Order, 1951 (S.I. 1951, No. 1196), is amended so that the standard for edible gelatine prescribed by that Order shall, as respects lead content, be in accordance with these new Regulations. The Regulations become operative April 16, 1962, and two years after that date a reduced limit will apply in the case of certain foods specified in Part II of the Schedule. LEAD IN FOOD REGULATIONS, 1961 (S.I. No. 1931) (5d.); (SCOTLAND) REGULATIONS, 1961 (S.I. No. 1942) (8d.).

For penalties for contraventions see Regulation 5 of the above S.I. No. 1931 and Regulation 6 of the above S.I. No. 1942 (relating to Scotland).

The Slaughterhouses (Hygiene) Regulations, 1958 (S.I. 1958, No. 2168), which otherwise came into operation on January 1, 1959, provided for the deferment of certain requirements relating to the construction, layout and equipment of existing slaughterhouses until such later dates as the Minister might appoint. This Order specifies the date (October 1, 1961) on which such provisions came into force in certain local authority areas. SLAUGHTERHOUSES (HYGIENE) REGULATIONS (APPOINTED DAY—NO. 3) ORDER, 1961 (S.I. No. 1815) (3d.).

See also under **Animals,** above, p. 847.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. No. 1794 (Coulsdon and Putney) (2d.); 1795 (Croydon) (3d.).

The following Order has been made prohibiting waiting: S.I. No. 1841 (Gravesend) (3d.).

The following Orders have been made respecting waiting and loading restrictions: S.I. No. 1796 (Croydon and Holborn) (9d.); S.I. No. 1807 (Croydon; and various streets in Barnet, Beckenham, Bermondsey, City of London, Epsom, Finchley, Greenwich, Hammersmith, Harringay, Hayes, Holborn, Paddington, West Ham, Westminster and Willesden).

Police

The Police Regulations, 1952 (S.I. 1952, No. 1704), are amended by providing for the payment of an allowance of £30 to a constable who on or after January 1, 1961, passes the promotion examination for promotion to sergeant and a payment of an allowance of £30 to a sergeant who on or after that date passes the promotion examination for promotion to inspector. Operative October 9, 1961. POLICE (NO. 3) REGULATIONS, 1961 (S.I. No. 1810) (3d.).

Road Traffic

The Road Vehicles Lighting Regulations, 1959 (S.I. 1959, No. 1869), are amended in certain respects. Apart from minor changes the following are the important changes: (1) The requirements of regulation 15 of the 1959 Regulations as to the marking of obligatory rear lamps carried on non-mechanically propelled vehicles supplied by their manufacturers after April 1, 1959, are extended as from October 19, 1962, to such vehicles (except trailers) which were supplied before April 1, 1959 (reg. 2 (6) (b)). (2) The same requirements as to the character of obligatory rear lamps carried on pedal bicycles and tricycles as are laid down in regulations 14 and 15 of the 1959 Regulations are applied to obligatory rear lamps carried on four-wheeled pedal cycles (" Social cycles ") (reg. 2 (5) and (6) (a)). (3) The positions in which obligatory rear lamps and obligatory red reflectors must be carried on four-wheeled pedal cycles are prescribed (reg. 2 (10) and (11)). (4) Section 2 (1) (b) of the Road Transport Lighting Act, 1957 (which prohibits the showing by vehicles to the rear of lights other than red) are varied so as to enable ambulances and vehicles used for police, fire brigade or fire salvage purposes to carry lamps displaying a blue light to the rear and road clearance vehicles to carry lamps displaying an amber light to the rear, subject to the lamps complying with the prescribed conditions. Road clearance vehicles are also permitted to display amber reflecting surfaces facing rearwards (reg. 2 (9)). Operative October 19, 1961. ROAD VEHICLES LIGHTING (AMENDMENT) REGULATIONS, 1961 (S.I. No. 1849) (4d.).

Theatre and Cinematograph

Earlier regulations relating to the exhibition of films and newsreels and the necessary licences in connection therewith are replaced.

The principal change is that in each case the fees prescribed in earlier regulations are increased by fifty per cent. FILMS (EXHIBITORS) REGULATIONS, 1961 (S.I. No. 1824) (4d.) and FILMS (RENTERS' LICENCES) REGULATIONS, 1961 (S.I. No. 1827) (3d.), both operative October 1, 1961. FILMS (REGISTRATION OF NEWSREELS) REGULATIONS, 1961 (S.I. No. 1825) (4d.) and FILMS (REGISTRATION) (AMENDMENT) REGULATIONS, 1961 (S.I. No. 1826) (3d.), both operative January 1, 1962.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 *New Fetter Lane, London, E.C.*4." *The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

88. *Inadequate driving licence—failure to produce—resulting charges*

A man was stopped whilst driving a motor-lorry and asked to produce his driving licence at that time. He was unable to produce the licence and accordingly was issued with a form to produce this licence at a police station within five days, etc. He failed to produce the licence and an enquiry was necessary to check the details on the licence. It was found that the licence examined did not cover the holder to drive motor-lorries. It was in fact a licence to cover motor-tractors only.

I maintain the following two offences are disclosed on these facts:

(1) Driving a motor-lorry upon a road whilst not being the holder of a driving licence (*no query over this*).

(2) Being a person driving a motor-lorry on a road and on being further required by a police constable, failed to produce the licence for examination, etc., contrary to section 225, Road Traffic Act, 1960.

This is where opinions differ, the opposing trend of thought is that the request to produce his driving licence can only refer to the licence which would cover the driving of a motor-lorry. As he did not possess such a licence, he cannot be prosecuted for failing to produce something he hasn't got.

I maintain he was required to produce a licence to drive a motor-vehicle (as *per* section 225) and had failed to do so. The main object of the Act is to enable the police to find out just such an offence and take action accordingly. He was not asked to produce a licence to drive a motor-lorry, he was asked to produce a licence to drive a motor-vehicle. He had such a licence, although it did not cover lorries, and failed to produce it. [H. C. S. L.]

ANSWER

In my view it is possible to argue that an offence under section 225 (1) and (4) of the Road Traffic Act, 1960, is disclosed. Section 225 (1) requires " a person driving a motor vehicle " to produce for examination " his licence to drive *a* motor vehicle granted under Part II of this Act " and not " his licence to drive *that* motor vehicle " or " his licence to drive a motor vehicle of that class or description." This view would not be inconsistent with the purpose of this provision which, according to subsection (1), is to enable the constable to find the name and address of the licence holder, the date of issue and the authority by which the licence was issued.

However, the police have a discretion in these matters and, in the circumstances, it might be felt that this man could be dealt with quite adequately by taking proceedings under section 98 only of the 1960 Act for driving without a licence. In this event all the facts could be placed before the magistrates and they would, no doubt, take into account the fact that the defendant had put the police to some trouble. [K. C. C.]

Letters to the Editor

Special Issue on Magistrates

Sir,

Your learned contributors in the special issue for October have raised a number of important issues which are of interest to all readers concerned with the day-to-day running of magistrates' courts. The ever increasing work which is cast upon magistrates, both lay and stipendiary, is one of these. As " A stipendiary magistrate " says: " With the volume of work at its present level, the difficulty is for the combined resources of both kinds of magistrates to keep on top of it." Naturally if there were sufficient lay justices, they could more easily shoulder their share of the work; but as " a Chairman of Quarter Sessions " points out: " The busy man, who is usually the able and successful man, can find these demands an intolerable burden."

I am convinced that the lay bench wants all the busy and successful men and women it can find. And especially those with youth on their side. But they may not come forward if too much time is demanded of them. " A Chairman of Quarter Sessions " would solve the problem by removing certain cases, particularly matrimonial cases, from the jurisdiction of lay justices on the ground that they " are unsatisfactory tribunals " for such work. With that opinion I profoundly disagree. But the object of this letter is not to enter that particular list but to point out that too much time is expended in perfunctory and routine tasks. The justices' time should be occupied in adjudicating in court and should not be wasted in such tasks as signing summonses and orders which, in a busy court, can be quite a burden. I have yet to meet a magistrate who would not gladly be relieved of signing motoring summonses by the dozen and rate summonses by the hundred. Surely the clerk can do all this.

Dr. Glanville Williams has written (*The Proof of Guilt*, 2nd ed., p. 322): " At the present day the legal knowledge of the clerk is essential to the proper working of the lay magistracy. Thus has arisen the peculiar situation in England that whereas justices are entrusted with the duty of deciding cases involving points of law, all the technical knowledge is possessed by their servant, on whose advice they must therefore rely."

The magistrate will grant the summons; but the clerk will draw it up; so why not let him sign it as well? And why should he not authenticate the written orders of the court, not forgetting the various forms that must be raised on a committal for trial? There is precedent for this already in that the clerk may sign liquor and betting licences on the justices' behalf, and indeed, some other forms. But the legislature has been somewhat haphazard in its choice of them and I would allow the clerk to sign them all.

No doubt this will be heresy to some. To them I would say that the ghost of George Nupkins, Esquire, still haunts the Magistrates' Courts Act and Rules, pompously telling the ghost of his clerk: " Mr.

Jinks, you are a fool, Sir," and in the next breath whispering to him for advice. That ghost should now be laid and a wind of change be blown through the Act. Modern conditions demand an up-to-date approach and a start could be made by a more realistic division of the functions between magistrates and clerk.

Yours faithfully,
R. H. LANGHAM,
Clerk to the Justices.

Wallington,
Surrey.

Sir,

I have read with interest the article on lay justices written by a chairman of quarter sessions, who is after all, in spite of his legal qualifications, a county magistrate, and I would like to take issue with him on some of the points he raises.

First he states that lay benches are unsuitable for deciding domestic issues because such cases are too technical or emotional. Whilst admitting that there are a number of difficult legal points in these cases for magistrates to decide—which incidentally to judge by the decisions of the divisional court they very often decide correctly—it appears to me that as a lay bench is composed of a cross-section of the community used to meeting such members of the community that they are an admirable tribunal for dealing with domestic issues. They also have a great deal of local knowledge about rates of pay and the possibilities of employment in the area when it comes to deciding what weekly amount they should order.

Secondly your contributor suggests indirectly that motoring offences might be removed from the jurisdiction of lay magistrates. Again I would suggest that a bench of lay magistrates composed, as they often are, of motorists and non-motorists is a very suitable tribunal for deciding whether or not a person has driven carelessly or dangerously or has driven when unfit to drive through drink or drugs. These on the whole are cases of fact which surely do not require any specialised training to be capable of deciding.

Thirdly he suggests that magistrates should not be appointed by Advisory Committees, but on the direct recommendation to the Lord Chancellor by the county court judge or the chairman or deputy chairman of quarter sessions. How on earth are these gentlemen to know anything about the suggested appointees other than by hearsay evidence? Advisory Committees on the other hand consist of local people, some magistrates some not, some members of whom more often than not know the suggested appointees and how suitable they may be as magistrates.

Your correspondent also suggests that the appointment of the chairman of the bench should be confirmed by the chairman of quarter sessions. How is the chairman of quarter sessions to know whether the suggested chairman is suitable? In the case of a borough bench the chairman of quarter sessions has probably never even met him, let alone know how suitable a chairman he might make. Who better than the magistrates themselves to decide by secret ballot who is the best person from agmongst their number to act as chairman? I find that benches are very jealous of the importance of the chairmanship and are very zealous to ensure that the most experienced and appropriate person is appointed to this office.

Another point your correspondent raises is the disparity of sentences by lay benches. As we all know this is not peculiar to lay benches, it applies to quarter sessions and assizes, where some quarter sessions benches and some judges take very different views of various offences. This must always be so where human beings are sitting in judgment. The only alternative to this would be fixed penalties, but this is neither desirable nor practical.

As for suggesting that returns of sentences should be made to the clerk of the peace. How better qualified is the clerk of the peace than the clerk to the justices, to decide whether or not magistrates are imposing correct penalties and what on earth would a return show? Let us assume that the return would show, for example:

Careless driving	£10
Obstruction	£10
Larceny	2 months' imprisonment

Without the fullest details no one could decide whether the penalties were excessive or ridiculously low.

Your correspondent also states that justices' clerks send to the Home Office a record of convictions and sentences. I know of no such return. What good would it be except for statistical purposes? If the suggested return had to deal with individual offences it would be so long as to be useless. If it was the sort of return which gave numbers of cases and totals of fines it would give no information about the uniformity of penalties.

My experience is that although the lay system may have its faults, it works, and it would be a poor day for the judicial system of this country if it was abolished.

Let us remember that the lay magistrate adjudicates in courts of *summary* jurisdiction and it is essential that the system should not be cluttered up with too many technicalities.

Yours faithfully,
CLERK TO THE JUSTICES.

Bedfordshire.

Books and Periodicals

Book Reviews:

Moriarty's Questions and Answers on Police Subjects. Second edition. By J. Daniel Devlin, LL.B. Butterworth & Co. 1961. 207 pp. 12s. 6d. net.

After a lapse of seven years another edition of this handy little volume has been issued. It is an old and trusted friend of the police promotion candidate and to those now seeking to pass an examination the advantage of finding over 650 questions and answers within the confines of one book will prove an excellent stimulant to study.

Mr. Devlin has brought the text up to date and has reorganised its presentation to correspond with the structure of the centralised Police Promotion Examinations. This arrangement greatly enhances the practical value of the book.

There is always a danger of over-simplification in setting out a large number of specimen examination answers, a danger which is not lessened by the wide range of subject-matter involved. It is apparent that the author has appreciated this because he has adopted a style in which accuracy is seldom allowed to suffer solely at the expense of clarity and brevity. This is no mean feat in itself. He may be not quite so happy in framing some of the answers to the administrative procedural questions but this is hardly his fault. As he points out, there is no comprehensive textbook in the field. With so many different police forces, each with its own administrators, it is doubtful if there ever will be.

The book, used as an examination primer, points the way to an almost endless fund of information valuable to the candidate. It will also lighten the task of any police officer concerned with training.

H. W. Howe.

Readers' Digest:

Betting and Gaming: Bingo and the Betting and Gaming Act, 1960: 17 *The Magistrate* 138.

Betting and Gaming: Bingo Clubs: 42 *Scots Law Times* 153.

Evidence: The exclusory rule regarding illegally seized evidence: An International Symposium: 52 *Journal of Criminal Law, Criminology and Police Science* 245.

Evidence: The handwriting expert: 232 *Law Times* 227.

Homicide: Automatism and insanity: 232 *Law Times* 245.

Homicide: Intent: 232 *Law Times* 191.

International Law: Some thoughts on the Eichmann Trial: 4 *The Lawyer* 7.

Law Reform: Collective responsibility for violence: 105 *Solicitors' Journal* 844.

Legal Aid: Legal aid and advice: The first decade: 4 *The Lawyer* 13.

Penology: Prison and borstal after-care: 125 *Justice of The Peace* 675.

Public Morals: Offences contra bonos mores: 105 *Solicitors' Journal* 897 and 922.

Road Traffic: The Law and the "L" driver: 69 *Police Review* 864.

Statutes: The new Licensing Act: 69 *Police Review* 826.

Statutes: The Criminal Justice Act, 1961 (1): 105 *Solicitors' Journal* 917.

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1961

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.4. Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter "r" appears in brackets (r) do not roll it. The letter "a" by itself is long, as in bay.]

Actus non facit reum nisi mens sit rea—The act itself does not constitute guilt unless done with a guilty intent [*act*-us nohn *fack*-it *ree*-um nigh-sigh mens sit rea(r).]
Actus reus—guilty act [*act*-us *ree*-us].
Ad idem—unanimous [ad *id*-em].
A fortiori—so much the more so, with greater reason [a for-she-*or*-eye].
Animus furandi—intent to steal [anny-*mus* fure-*and*-eye].
Autrefois acquit—formerly acquitted [aw-tre-foys ack-*uit*].
Bona fide—in good faith [*bone*-er *fie*-dee].
Fons et origo—the source and origin [fons et orry-go].
Casus omissus—omitted case, a gap in the law [*carr*-sus oh-*miss*-us].
De minimis non curat lex—the law does not concern itself with trifles [day *minny*-mis nohn *cure*-at lex].
Doli incapax—incapable of crime [*dole*-eye *in*-cap-axe].
Ejusdem generis—of the same kind or nature [ee-*juss*-dem *gen*-er-iss].
Ex hypothesi—from the nature of the case, following from this assumption [ex high-*poth-ess*-eye].
Ex officio—by virtue of office [ex off-*ish*-ee-oh].
Ex post facto—by subsequent fact, retrospectively [ex post *fact*-oh].
Ex proprio motu—on his own initiative [ex proh-prea(r) *mote*-u].
Ferae naturae—wild (of animals) [*fe*-righ na-*turr*-righ].
Functus officio—having discharged his duty [*funk*-tus off-*ish*-ee-oh].
In loco parentis—in the position of parent [in *lock*-oh par-*en*-tiss].
Inter alia—among other things [inter *a*-lea(r)].
In toto—in entirety [in toe-toe].
Mala prohibita—a wrongful act prohibited by law (as opposed to *mala in se*, an act wrongful in itself) (*ma*(r)-la(r) pro-*hib*-it-a(r)].
Mansuetae naturae—tame (of animals) [man-su-*a*-tigh na-*turr-righ*].
Mens rea—guilty mind [men's rea(r)].
Munus publicum—act of charity [moo-nus *pub*-lee-cum].
Noscitur a sociis—it is known by its associates [nos-sit-*ur* a *sock*-y-is].
Obiter—a remark by the way, not part of the decision [oh-bitter].
Per contra—on the other hand [per *con*-tra(r)].
Per incuriam—through want of care, a dictum clearly the result of oversight [per in-*cur*-eeam].
Per se—in itself (themselves) [per-see].
Ratio decidendi—the reason or ground for a judicial decision [*ray*-she-oh dee-sid-*end*-eye].
Sine die—indefinitely, without fixing a date [*sign*-a *dee*-a].
Sine que non—without which nothing (can be done) [sigh-knee kway non].
Stare decisis—binding precedent [*star*-ee de-*sis*-is].
Sub judice—under judicial consideration [sub *ju*-dissee].
Sui generis—unique, is a class of its own [*soo*-eye *gen*-er-iss].

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17: Hertford	14: Chelmsford	17: Lewes
24: Cambridge	28: Kingston	
31: Ipswich		

Wales and Chester Circuit (McNair, Karminski and Ashworth JJ.)

January	*February*	*March*
12: Welshpool	2: Mold	2: Haverfordwest
16: Dolgellau	7: Chester	7: Carmarthen
18: Caernarvon	20: Presteign	14: Cardiff
25: Beaumaris	22: Brecon	
27: Ruthin	27: Lampeter	

Western Circuit (Slade, Collingwood and Elwes JJ.)

January	*February*	*March*
12: Devizes	7: Exeter	7: Winchester
18: Dorchester	21: Bristol	
24: Taunton		
31: Bodmin		

Northern Circuit (Jones, Gorman, Stevenson and Nield JJ.)

January	*February*	*March*
14: Appleby	7: Liverpool	7: Manchester
17: Carlisle		
26: Lancaster		

Oxford Circuit (Cassels and Finnemore JJ.)

January	*February*	*March*
12: Reading	7: Gloucester	7: Stafford
19: Worcester	14: Newport	14: Birmingham
26: Oxford	22: Hereford	
	28: Shrewsbury	

Midland Circuit (Pilcher, Streatfeild and Phillimore JJ.)

January	*February*	*March*
12: Aylesbury	4: Oakham	7: Warwick
17: Bedford	7: Lincoln	14: Birmingham
24: Northampton	14: Derby	
31: Leicester	21: Nottingham	

North Eastern Circuit (Havers, Wrangham, Tesiger and Fenton Atkinson JJ.)

January	*February*	*March*
12: Newcastle	7: York	7: Leeds
24: Durham	21: Sheffield	

County Quarter Sessions

	January
Bedfordshire	2
Berkshire (Reading)	2
Buckinghamshire (Aylesbury)	2
Cambridgeshire	6
Carmarthenshire	6
Cheshire (Chester)	10
Cheshire (Knutsford)	16
Cumberland (Carlisle)	3
Denbigh (Ruthin)	6
Devon (Exeter)	3
Devon (Plymouth)	2
Dorset (Dorchester)	4
Essex	4
Flint (Mold)	5
Glamorgan (Cardiff)	3, 25
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Lincolnshire (Kesteven)	5
Merioneth (Dolgellau)	23
Nottinghamshire (Nottingham)	2
Norfolk (Kings Lynn)	10
Norfolk (Norwich)	4
Oxford (Oxfordshire)	3
Oxford (Oxfordshire) (Appeals)	31
Peterborough, Soke of (Peterborough)	12
Rutland (Oakham)	10
Shropshire (Shrewsbury)	4
Somerset (Taunton)	4
Suffolk West	3
Sussex (Chichester)	5
Warwick	3
Westmorland (Kendal)	6
Wiltshire (Devizes)	4
Wiltshire (Salisbury)	5

	February
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Hertfordshire (St. Albans)	6
Hertforshire (St. Albans) (Appeals)	7
Hertfordshire (Hertford)	28
Kent (Canterbury)	6

	February
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Nottinghamshire (East Retford)	9
Oxfordshire (Oxford Appeals)	28
Sussex (Chichester)	23

BOROUGH QUARTER SESSIONS

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Bridgewater	19
Bristol	2
Canterbury	26
Croydon	3
Deal	6
Dover	6
Folkestone	7
Grantham	6
Gravesend	12

	January
Guildford	20
Newark	25, 26
Poole	16
Reading	18
Rochester	5
Rotherham	9
Southend-on-Sea	9
Wigan	9
Winchester	19

	February
Andover	14
Croydon	23

	February
Hereford	24

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21: Bristol	

CALENDAR

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January	*February*	*March*
14: Appleby	7: Liverpool	7: Manchester
17: Carlisle		
26: Lancaster		

Oxford Circuit (Cassels and Finnemore JJ.)

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17: Bedford	7: Lincoln	14: Birmingham
24: Northampton	14: Derby	
31: Leicester	21: Nottingham	

North Eastern Circuit (Havers, Wrangham, Thesiger and Fenton Atkinson JJ.)

January	*February*	*March*
12: Newcastle	7: York	7: Leeds
24: Durham	21: Sheffield	

CENTRAL CRIMINAL COURT

First Working Days

March 1, 21

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Kent (Canterbury)	6

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Oxfordshire (Oxford Appeals)	28
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Northampton	9
Nottinghamshire	27
Oxfordshire	28
Oxfordshire (Appeals)	21
Warwickshire	28
Westmorland	3
Wiltshire (Salisbury)	29
Yorkshire, East Riding	14

BOROUGH QUARTER SESSIONS

	February		February
Andover	14	Lichfield	6
Croydon	23	Oldham	1
Devizes	24	Oxford	10
Hereford	24		
	March		March
Abingdon	8	Shrewsbury	14
Bristol	27	Southend-on-Sea	13
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WINTER ASSIZES, 1961

First Working Days

South Eastern Circuit (Stable and Glyn-Jones JJ.)

March

7: Maidstone
17: Lewes

Wales and Chester Circuit (McNair, Karminski and Ashworth JJ.)

March

2: Haverfordwest
7: Carmarthen
14: Cardiff

Western Circuit (Slade, Collingwood and Elwes JJ.)

March

7: Winchester

Northern Circuit (Jones, Gorman, Stevenson and Nield JJ.)

March

7: Manchester

Oxford Circuit (Cassels and Finnemore JJ.)

March

7: Stafford
14: Birmingham

Midland Circuit (Pilcher, Streatfeild and Phillimore JJ.)

March

7: Warwick
14: Birmingham

North Eastern Circuit (Havers, Wrangham, Thesiger and Fenton Atkinson JJ.)

March

7: Leeds

CENTRAL CRIMINAL COURT

First Working Days

March 1, 21

COUNTY QUARTER SESSIONS

	March
Anglesey	14
Cumberland	28
Glamorgan	21
Gloucestershire	14, 15
Herefordshire	27
Kent, East	27
Kent, East (Appeals)	10
Kent, West (Appeals)	23, 24
Leicestershire	14
Lincoln (Holland: Spalding)	23
Norfolk	29
Northampton	9
Nottinghamshire	27
Oxfordshire	28
Oxfordshire (Appeals)	21
Warwickshire	28
Westmorland	3
Wiltshire (Salisbury)	29
Yorkshire, East Riding	14

	April
Bedfordshire	5
Berkshire	10
Buckinghamshire	5
Caernarvonshire	6
Cambridgeshire	7
Cardigan	6
Carmarthenshire	7
Cheshire (Chester)	17
Cheshire (Knutsford)	11
Denbighshire (Denbigh)	7
Devonshire	11, 16
Dorset	5
Essex	12
Flintshire	6
Glamorganshire (Cardiff)	17
Hampshire	4
Hertfordshire (St. Albans)	10
Hertfordshire (St. Albans) (Appeals)	11
Huntingdonshire	4
Isle of Ely (Ely)	5
Isle of Wight	12
Kent, East (Appeals)	28
Kent, West	10
Kent, West (Appeals)	20, 21
Lincolnshire (Kesteven)	6
Merioneth (Bala)	11
Montgomeryshire (Newtown)	6
Norfolk (King's Lynn)	19
Oxfordshire (Appeals)	25
Peterborough, Soke of	13
Rutland	11
Shropshire	12
Somerset	5
Suffolk, West	11
Sussex, West	6
Westmorland	7

BOROUGH QUARTER SESSIONS

	March		March
Abingdon	8	Hereford	2
Bristol	27	Shrewsbury	14
Burnley	3	Southend-on-Sea	13
Burton-on-Trent	6		

	April		April
Birkenhead	10	Guildford	14
Bridgwater	20	Maidstone	24
Canterbury	27	Margate	28
Croydon	13	Newark	20, 21
Deal	7	Poole	10
Dover	7	Reading	19
Folkestone	8	Rochester	21
Grantham	21	Stafford	11
Gravesend	13	Swansea	26

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First Working Days

Northern Circuit (Jones, Veale and Scarman JJ.)

April
7: Liverpool
25: Manchester

North-Eastern Circuit (Ashworth, Cairns, Megaw, Lawton and Widgery JJ.)

April
18: Leeds

CENTRAL CRIMINAL COURT
First Working Days
May 2, 30

CALENDAR

COUNTY QUARTER SESSIONS

	April
Bedfordshire	5
Berkshire	10
Buckinghamshire	5
Caernarvonshire	6
Cambridgeshire	7
Cardigan	6
Carmarthenshire	7
Cheshire (Chester)	17
Cheshire (Knutsford)	11
Denbighshire (Denbigh)	7
Devonshire	11, 16
Dorset	5
Essex	12
Flintshire	6
Glamorganshire (Cardiff)	17
Hampshire	4
Hertfordshire (St. Albans)	10
Hertfordshire (St. Albans) (Appeals)	11

	April
Huntingdonshire	4
Isle of Ely (Ely)	5
Isle of Wight	12
Kent, East (Appeals)	28
Kent, West	10
Kent, West (Appeals)	20, 21
Lincolnshire (Kesteven)	6
Merioneth (Bala)	11
Montgomeryshire (Newtown)	6
Norfolk (King's Lynn)	19
Oxfordshire (Appeals)	25
Peterborough, Soke of	13
Rutland	11
Shropshire	12
Somerset	5
Suffolk, West	11
Sussex, West	6
Westmorland	7

	May
Devonshire	16
Hertfordshire (Hertford)	29, 30
Hertfordshire (Hertford) (Appeals)	30
Kent, East	29

	May
Kent, West (Appeals)	18, 19
Nottinghamshire (Newark)	1
Oxfordshire (Appeals)	30
Sussex, West	11
Westmorland	19

BOROUGH QUARTER SESSIONS

	April
Birkenhead	10
Blackburn	18
Bridgwater	20
Canterbury	27
Croydon	5
Deal	7
Derby	5
Dover	7
Folkestone	8
Grantham	21
Gravesend	13
Guildford	14
Maidstone	24

	April
Margate	28
New Sarum	10
Newark	20, 21
Oldham	4
Oxford	25
Plymouth	5
Poole	10
Reading	19
Rochester	21
Sheffield	6
Stafford	11
Swansea	26
Wigan	10

	May
Andover	15
Cardiff	8
Devizes	12
Dudley	29

	May
Hereford	5
Southend-on-Sea	15
Winchester	4

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SUMMER ASSIZES, 1961

First Working Days

South Eastern Circuit (Pilcher and Barry JJ.)

May	*June*	*July*
4: Huntingdon	6: Chelmsford	11: Lewes
9: Hertford	20: Kingston	
16: Cambridge	27: Maidstone	
24: Bury St. Edmunds		
30: Norwich		

Wales and Chester Circuit (Finnemore, Streatfeild and Lloyd-Jones JJ.)

May	*June*	*July*
2: Welshpool	13: Presteign	4: Swansea
5: Dolgellay	15: Brecon	
9: Caernarvon	20: Lampeter	
16: Beaumaris	22: Haverfordwest	
18: Ruthin	27: Carmarthen	
25: Mold		
30: Chester		

Western Circuit (Hilbery, Stevenson and Marshall JJ.)

May	*June*	*July*
9: Salisbury	6: Exeter	4: Winchester
16: Dorchester	20: Bristol	
23: Wells		
30: Bodmin		

Northern Circuit (Wrangham, Veale, Lawton and Widgery JJ.)

May	*June*	*July*
13: Appleby	13: Liverpool	4: Manchester
16: Carlisle		
26: Lancaster		

Oxford Circuit (Stable and Fenton Atkinson JJ.)

May	*June*	*July*
9: Oxford	6: Newport	11: Birmingham
16: Worcester	13: Hereford	
25: Gloucester	20: Shrewsbury	
	27: Stafford	

Midland Circuit (Hinchcliffe, Edmund Davies and Baker JJ.)

May	*June*	*July*
3: Aylesbury	1: Lincoln	4: Warwick
9: Bedford	13: Derby	11: Birmingham
16: Northampton	20: Nottingham	
24: Leicester		
31: Oakham		

North Eastern Circuit (Jones, Hewson, Nield and Howard JJ.)

May	*June*	*July*
9: Newcastle	6: York	4: Leeds
24: Durham	20: Sheffield	

CENTRAL CRIMINAL COURT

First Working Days

May 2, 30 June 20

COUNTY QUARTER SESSIONS

	May		May
Devonshire	16	Kent, West (Appeals)	18, 19
Essex	29	Nottinghamshire (Newark)	1
Hertfordshire (Hertford)	29, 30	Oxfordshire (Appeals)	30
Hertfordshire (Hertford) (Appeals)	30	Sussex, West	11
Kent, East	29	Westmorland	19

	June		June
Anglesey	20	Kent, East (Appeals)	9
Berkshire	26	Kent, West	12
Buckinghamshire	26	Kent, West (Appeals)	19, 20
Caernarvonshire	29	Leicester	13
Cheshire (Chester)	20	Lincoln (Holland: Boston)	26
Cheshire (Knutsford)	26	Northampton	15
Glamorganshire (Cardiff)	27	Nottinghamshire (Nottingham)	8
Gloucestershire	20, 21	Oxfordshire (Appeals)	27
Hampshire	19	Suffolk, West	27
Hertfordshire (Hertford)	26	Somerset	28
Hertfordshire (Hertford) (Appeals)	27	Sussex, West	22
Isle of Wight	14	Warwick	27
Kent, East	26	Yorkshire, East Riding	20

BOROUGH QUARTER SESSIONS

	May		June
Andover	15	Abingdon	7
Croydon	24	Croydon	28
Devizes	12	Oxford	2
Dudley	29	Poole	26
Hereford	5	Shrewsbury	6
Lichfield	12	Strafford	6
Southend-on-Sea	15	Swansea	29
Sunderland	3		
Winchester	4		

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6: Chelmsford
20: Kingston
27: Maidstone

July
11: Lewes

Wales and Chester Circuit (Finnemore, Streatfeild and Lloyd-Jones JJ.)

June
13: Presteign
15: Brecon
20: Lampeter
22: Haverfordwest
27: Carmarthen

July
4: Swansea

Western Circuit (Hilbery, Stevenson and Marshall JJ.)

June
6: Exeter
20: Bristol

July
4: Winchester

Northern Circuit (Wrangham, Veale, Lawton and Widgery JJ.)

June
13: Liverpool

July
4: Manchester

Oxford Circuit (Stable and Fenton Atkinson JJ.)

June	*July*
6: Newport	11: Birmingham
13: Hereford	
20: Shrewsbury	
27: Stafford	

Midland Circuit (Hinchcliffe, Edmund Davies and Baker JJ.)

June	*July*
1: Lincoln	4: Warwick
13: Derby	11: Birmingham
20: Nottingham	

North Eastern Circuit (Jones, Hewson, Nield and Howard JJ.)

June	*July*
6: York	4: Leeds
20: Sheffield	

CENTRAL CRIMINAL COURT

First Working Days

June 20	July 11

COUNTY QUARTER SESSIONS

	June
Anglesey	20
Berkshire	26
Buckinghamshire	26
Caernarvonshire	29
Cheshire (Chester)	20
Cheshire (Knutsford)	26
Glamorganshire (Cardiff)	27
Gloucestershire	20, 21
Hampshire	19
Hertfordshire (Hertford)	26
Hertfordshire (Hertford) (Appeals)	27
Isle of Wight	14
Kent, East	26
Kent, East (Appeals)	9
Kent, West	12
Kent, West (Appeals)	19, 20
Leicester	13
Lincoln (Holland: Boston)	26
Northampton	15
Nottinghamshire (Nottingham)	8
Oxfordshire (Appeals)	27
Suffolk, West	27
Somerset	28
Sussex, West	22
Warwick	27
Yorkshire, East Riding	20

	July
Bedfordshire	3
Cambridgeshire	14
Cardigan	6
Carmarthenshire	7
Cumberland (Carlisle)	4
Denbigh (Colwyn Bay)	7
Devonshire	11
Dorset	5
Essex	5
Flint	6
Herefordshire (Hereford)	3
Hertfordshire (Hertford)	25
Hertfordshire (St. Albans)	31
Huntingdon	4
Isle of Ely (Wisbech)	5
Kent, East (Appeals)	14
Kent, West	17
Kent, West (Appeals)	24, 25
Lincoln (Kesteven: Stamford)	13
Merioneth (Bala)	4
Montgomery (Welshpool)	6
Norfolk (King's Lynn)	12
Norfolk (Norwich)	5
Nottinghamshire (East Retford)	31
Oxfordshire	4
Oxfordshire (Appeals)	25
Peterborough, Soke of	6
Rutland	4
Shropshire	5
Westmorland	7
Wiltshire (Warminster)	5

BOROUGH QUARTER SESSIONS

	June		June
Abingdon	7	Shrewsbury	6
Burton-upon-Trent	15	Strafford	6
Croydon	28	Sunderland	5, 8
Oxford	2	Swansea	29
Poole	26	West Bromwich	19
	July		July
Andover	10	Guildford	14
Bridgwater	27	Maidstone	3
Bristol	31	Margate	21
Canterbury	27	Newark	27, 28
Deal	28	Reading	12
Dover	8	Rochester	21
Folkestone	8	Southend-on-Sea	10
Grantham	7	Winchester	31
Gravesend	20		

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Summer Assizes, 1961

First Working Days

South Eastern Circuit (Pilcher and Barry JJ.)

July
11: Lewes

Wales and Chester Circuit (Finnemore, Streatfeild and Lloyd-Jones JJ.)

July
4: Swansea

Western Circuit (Hilbery, Stevenson and Marshall JJ.)

July
4: Winchester

Northern Circuit (Wrangham, Veale, Lawton and Widgery JJ.)

July
4: Manchester

Oxford Circuit (Stable and Fenton Atkinson JJ.)

July
11: Birmingham

Midland Circuit (Hinchcliffe, Edmund Davies and Baker JJ.)

July

4: Warwick
11: Birmingham

North Eastern Circuit (Jones, Hewson, Nield and Howard JJ.)

July

4: Leeds

CENTRAL CRIMINAL COURT

First Working Day

July 11

COUNTY QUARTER SESSIONS

	July		July
Bedfordshire	3	Kent, West	17
Cambridgeshire	14	Kent, West (Appeals)	24, 25
Cardigan	6	Lincoln (Kesteven: Stamford)	13
Carmarthenshire	7	Merioneth (Bala)	4
Cumberland (Carlisle)	4	Montgomery (Welshpool)	6
Denbigh (Colwyn Bay)	7	Norfolk (King's Lynn)	12
Devonshire	11	Norfolk (Norwich)	5
Dorset	5	Nottinghamshire (East Retford)	31
Essex	5	Oxfordshire	4
Flint	6	Oxfordshire (Appeals)	25
Herefordshire (Hereford)	3	Peterborough, Soke of	6
Hertfordshire (Hertford)	25	Rutland	4
Hertfordshire (St. Albans)	31	Shropshire	5
Huntingdon	4	Westmorland	7
Isle of Ely (Wisbech)	5	Wiltshire (Warminster)	5
Kent, East (Appeals)	14		
	August		August
Glamorganshire	2	Oxfordshire (Appeals)	29
Hertfordshire (St. Albans)	1	Sussex, West	3
Kent, East	21	Westmorland	18
Kent, West (Appeals)	28, 29		

BOROUGH QUARTER SESSIONS

	July		July
Andover	10	Guildford	14
Blackburn	11	Maidstone	3
Bradford	3	Margate	21
Bridgwater	27	Newark	27, 28
Bristol	31	Oxford	6
Canterbury	27	Reading	12
Deal	28	Rochester	21
Dover	8	Rotherham	31
Folkestone	8	Southend-on-Sea	10
Grantham	7	Winchester	31
Gravesend	20	Wolverhampton	18
	August		August
Birkenhead	2	Winchester	2
Croydon	1		

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Autumn Assizes, 1961

First Working Days

South Eastern Circuit (Finnemore and Havers JJ.)

October

3: Hertford
10: Cambridge
17: Bury St. Edmunds
24: Norwich
31: Chelmsford

November

14: Kingston
21: Maidstone

December

5: Lewes

Wales and Chester Circuit (Karminski, Hinchcliffe and Salmon JJ.)

October

4: Caernarvon
12: Ruthin
19: Chester

November

7: Brecon
10: Carmarthen
21: Cardiff

Western Circuit (Streatfeild, Gorman and Baker JJ.)

October	*November*
4: Devizes	14: Bristol
11: Dorchester	28: Winchester
17: Taunton	
24: Bodmin	
31: Exeter	

Northern Circuit (Marshall, Fenton Atkinson, Megaw and Lawton JJ.)

October	*November*
4: Carlisle	21: Manchester
17: Lancaster	
31: Liverpool	

Oxford Circuit (Sachs and Paull JJ.)

October	*November*	*December*
3: Reading	8: Hereford	5: Birmingham
10: Oxford	14: Shrewsbury	
17: Worcester	23: Stafford	
24: Gloucester		
31: Newport		

Midland Circuit (Stable, Thesiger and Cairns JJ.)

October	*November*	*December*
4: Aylesbury	7: Derby	5: Birmingham
10: Bedford	14: Nottingham	
17: Northampton	28: Warwick	
24: Leicester		
31: Lincoln		

North Eastern Circuit (Jones, Winn, Lloyd-Jones and Nield JJ.)

October	*November*
4: Newcastle	14: Sheffield
17: Durham	28: Leeds
31: York	

CENTRAL CRIMINAL COURT

First Working Days

September 12	October 17

COUNTY QUARTER SESSIONS

	August		August
Glamorganshire	2	Oxfordshire (Appeals)	29
Hertfordshire (St. Albans)	1	Sussex, West	3
Kent, East	21	Westmorland	18
Kent, West (Appeals)	28, 29		

	September
Anglesey	26
Bedfordshire	20
Berkshire	25
Buckinghamshire	25
Caernarvonshire	14
Cumberland (Carlisle)	26
Denbigh (Wrexham)	29
Devonshire	19
Dorset	27
Essex	4
Flintshire	28
Glamorgan (Cardiff)	18
Glamorgan (Swansea)	26
Gloucestershire	19, 20
Hampshire	18
Hertfordshire (St. Albans)	25
Hertfordshire (St. Albans) (Appeals)	26
Isle of Wight	20

	September
Kent, East (Appeals)	1
Kent, West	4
Kent, West (Appeals)	18, 19
Lincolnshire (Kesteven)	28
Merioneth (Dolgellau)	26
Montgomery (Newtown)	28
Norfolk (Norwich)	27
Northamptonshire	28
Oxfordshire	19
Oxfordshire (Appeals)	26
Rutland	19
Shropshire	20
Somerset	27
Staffordshire	26
Suffolk, West	26
Sussex, West	28
Warwickshire	26
Wiltshire	27
Yorkshire, East Riding	19

BOROUGH QUARTER SESSIONS

	August		August
Birkenhead	2	Sunderland	9
Croydon	1	Wigan	2
Sheffield	15	Winchester	2

	September		September
Abingdon	7	Poole	18
Croydon	18	Rochester	29
Devizes	8	Southend-on-Sea	18
Dudley	21	Shrewsbury	5
Hereford	1	West Bromwich	14

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First Working Days

South Eastern Circuit (Finnemore and Havers JJ.)

October
3: Hertford
10: Cambridge
17: Bury St. Edmunds
24: Norwich
31: Chelmsford

November
14: Kingston
21: Maidstone

December
5: Lewes

Wales and Chester Circuit (Karminski, Hinchcliffe and Salmon JJ.)

October
4: Caernarvon
12: Ruthin
19: Chester

November
7: Brecon
10: Carmarthen
21: Cardiff

Western Circuit (Streatfeild, Gorman and Baker JJ.)

October

4: Devizes
11: Dorchester
17: Taunton
24: Bodmin
31: Exeter

November

14: Bristol
28: Winchester

Northern Circuit (Marshall, Fenton Atkinson, Megaw and Lawton JJ.)

October

4: Carlisle
17: Lancaster
31: Liverpool

November

21: Manchester

Oxford Circuit (Sachs and Paull JJ.)

October

3: Reading
10: Oxford
17: Worcester
24: Gloucester
31: Newport

November

8: Hereford
14: Shrewsbury
23: Stafford

December

5: Birmingham

Midland Circuit (Stable, Thesiger and Cairns JJ.)

October

4: Aylesbury
10: Bedford
17: Northampton
24: Leicester
31: Lincoln

November

7: Derby
14: Nottingham
28: Warwick

December

5: Birmingham

North Eastern Circuit (Jones, Winn, Lloyd-Jones and Nield JJ.)

October

4: Newcastle
17: Durham
31: York

November

14: Sheffield
28: Leeds

CENTRAL CRIMINAL COURT

First Working Days

September 12

October 17

County Quarter Sessions

	September
Anglesey	26
Bedfordshire	20
Berkshire	25
Buckinghamshire	25
Caernarvonshire	14
Cumberland (Carlisle)	26
Denbigh (Wrexham)	29
Devonshire	19
Dorset	27
Essex	4
Flintshire	28
Glamorgan (Cardiff)	18
Glamorgan (Swansea)	26
Gloucestershire	19, 20
Hampshire	18
Hertfordshire (St. Albans)	25
Hertfordshire (St. Albans) (Appeals)	26
Isle of Wight	20

	September
Kent, East (Appeals)	1
Kent, West	4
Kent, West (Appeals)	18, 19
Lincolnshire (Kesteven)	28
Merioneth (Dolgellau)	26
Montgomery (Newtown)	28
Norfolk (Norwich)	27
Northamptonshire	28
Oxfordshire	19
Oxfordshire (Appeals)	26
Rutland	19
Shropshire	20
Somerset	27
Staffordshire	26
Suffolk, West	26
Sussex, West	28
Warwickshire	26
Wiltshire	27
Yorkshire, East Riding	19

	October
Cambridgeshire	6
Cardiganshire	5
Carmarthenshire	6
Cheshire (Chester)	9
Cheshire (Knutsford)	3
Devonshire	24
Essex	23
Herefordshire	2
Huntingdonshire	3
Isle of Ely (Ely)	4
Kent, East	2

	October
Kent, East (Appeals)	6
Kent, West	16
Kent, West (Appeals)	9, 10
Leicestershire	10
Lincolnshire (Holland: Spalding)	5
Norfolk (King's Lynn)	4
Nottinghamshire (Nottingham)	2
Oxfordshire (Appeals)	31
Peterborough, Soke of	12
Westmorland	6

Borough Quarter Sessions

	September
Abingdon	7
Banbury	5
Bradford	13
Croydon	18
Derby	12
Devizes	8
Dudley	21
Hastings	27

	September
Hereford	1
Lichfield	7
Oldham	25
Poole	18
Rochester	29
Southend-on-Sea	18
Shrewsbury	5
West Bromwich	14

	October
Andover	23
Bridgwater	26
Bristol	2
Canterbury	26
Croydon	19
Dover	7
Folkestone	7
Grantham	6
Gravesend	12

	October
Guildford	20
Lincoln	2
Maidstone	9
Margate	6
Oxford	4
Reading	18
Swansea	9
Winchester	19

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21: Maidstone	

Wales and Chester Circuit (Karminski, Hinchcliffe and Salmon JJ.)

November

7: Brecon
10: Carmarthen
21: Cardiff

Western Circuit (Streatfeild, Gorman and Baker JJ.)

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14: Bristol
28: Winchester

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Northern Circuit (Marshall, Fenton Atkinson, Megaw and Lawton JJ.)

November

21: Manchester

Oxford Circuit (Sachs and Paull JJ.)

November	*December*
8: Hereford	5: Birmingham
14: Shrewsbury	
23: Stafford	

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November	*December*
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14: Nottingham	
28: Warwick	

North Eastern Circuit (Jones, Winn, Lloyd-Jones and Nield JJ.)

November

14: Sheffield
28: Leeds

CENTRAL CRIMINAL COURT

First Working Day

October 17

COUNTY QUARTER SESSIONS

	October
Cambridgeshire	6
Cardiganshire	5
Carmarthenshire	6
Cheshire (Chester)	9
Cheshire (Knutsford)	3
Devonshire	24
Essex	23
Herefordshire	2
Huntingdonshire	3
Isle of Ely (Ely)	4
Kent, East	2

	October
Kent, East (Appeals)	6
Kent, West	16
Kent, West (Appeals)	9, 10
Leicestershire	10
Lincolnshire (Holland: Spalding)	5
Norfolk (King's Lynn)	4
Nottinghamshire (Nottingham)	2
Oxfordshire (Appeals)	31
Peterborough, Soke of	12
Westmorland	6

	November
Hertfordshire (Hertford)	13, 28
Hertfordshire (Hertford) (Appeals	14
Kent, East	6
Kent, East (Appeals)	17

	November
Kent, West (Appeals)	13, 14
Nottinghamshire (Newark)	8
Oxfordshire (Appeals)	28
Sussex, West	2

BOROUGH QUARTER SESSIONS

	October		October
Andover	23	Halifax	4
Blackburn	10	Lincoln	2
Bridgwater	26	Maidstone	9
Bristol	2	Margate	6
Canterbury	26	Newark	26, 27
Croydon	19	Oxford	4
Dover	7	Plymouth	10
Folkestone	7	Reading	18
Grantham	6	Sunderland	2
Gravesend	12	Swansea	9
Guildford	20	Winchester	19

	November		November
Birkenhead	20	Hastings	29
Deal	17	Hereford	24
Devizes	24	Southend-on-Sea	13

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28: Leeds

COUNTY QUARTER SESSIONS

	November		November
Hertfordshire (Hertford)	13, 28	Nottinghamshire (Newark)	8
Hertfordshire (Hertford) (Appeals)	14	Oxfordshire (Appeals)	28
Kent, East	6	Sussex, West	2
Kent, East (Appeals)	17	Warwickshire	14
Kent, West (Appeals)	13, 14	Westmorland	17

	December		December
Anglesey	12	Kent, West (Appeals)	18, 19
Caernarvonshire	28	Lincolnshire (Holland: Boston)	18
Gloucestershire	6	Oxfordshire	19
Kent, West	4	Yorkshire, East Riding	12

BOROUGH QUARTER SESSIONS

	November		November
Birkenhead	15	Hereford	24
Bradford	7	Lichfield	9
Croydon	27	Oxford	17
Deal	17	Southend-on-Sea	13
Devizes	24	Wigan	6
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	December		December
Abingdon	7	Shrewsbury	19
Birkenhead	29	West Bromwich	21
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December
5: Birmingham

CENTRAL CRIMINAL COURT

First Working Day

December 5

COUNTY QUARTER SESSIONS

	December		December
Anglesey	12	Lincolnshire (Holland: Boston)	18
Caernarvonshire	28	Oxfordshire	19
Gloucestershire	6	Worcestershire	12, 13, 14
Kent, West	4	Yorkshire, East Riding	12
Kent, West (Appeals)	18, 19		

BOROUGH QUARTER SESSIONS

	December		December
Abingdon	13	Sunderland	20
Banbury	5	Walsall	14
Birkenhead	29	West Bromwich	21
Dudley	13	Worcester	21
Shrewsbury	19		

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UL 19 MAR 1962